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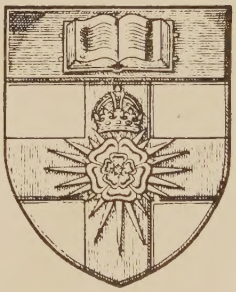

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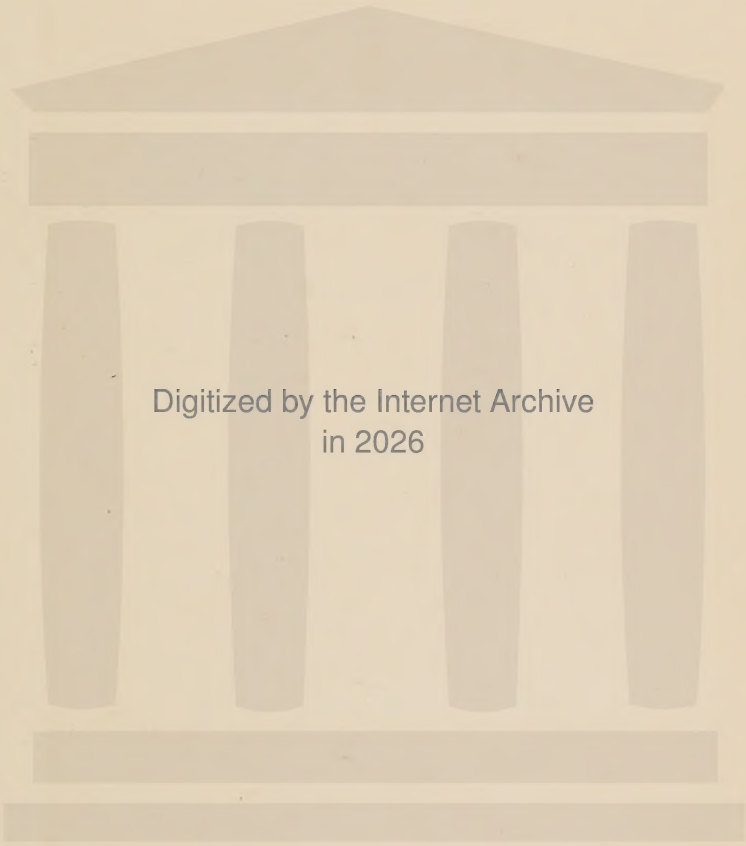

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Abergavenny (Marquis of) *v.* Bishop of Llandaff		460
Amersham Union (Guardians of) *v.* Guardians of City of London Union		103
Anlaby *v.* Prætorius	(C. A.)	764
Armstead, Betts *v.*		771
Arrowsmith *v.* Dickenson		252
Aylmer, In re. Ex parte Bischoffsheim	(C. A.)	258
Ayres, Swain *v.*		585

B.

Banner, Witt *v.*	(C. A.)	114
Barley, Whiteley *v.*		196
Barnes, Pine *v.*		221
Beal *v.* Town Clerk of Exeter		300
Beckley, Reg. *v.*	(C. C. R.)	187
Bedminster Union (Guardians of), Guardians of Medway Union *v.*		191
Berridge, Reeve *v.*	(C. A.)	523
Bethell *v.* Clark	(C. A.)	615
Betts *v.* Armstead		771
Bignold, Viney *v.*		172
Birkdale (Overseers of), Tunnicliffe *v.*	(C. A.)	450
Bischoffsheim, Ex parte. In re Aylmer	(C. A.)	258
Bishop, Stevens *v.*	(C. A.)	442
Bonella *v.* Twickenham Local Board of Health	(C. A.)	63
Bourne *v.* Netherseal Colliery Company	(C. A.)	606
Bray, Hesketh *v.*		589
Bridges *v.* Miller		287
Briscoe, Deutsche Springstoff Actien Gesellschaft *v.*		177
Brown, Ex parte. In re Smith	(C. A.)	321
———, Ex parte. In re Suffield and Watts	(C. A.)	693
Buckmaster, Reg. *v.*	(C. C. R.)	182
Burdett, In re. Ex parte Byrne	(C. A.)	310
Bury (Mayor, &c., of) *v.* Lancashire and Yorkshire Railway Company	(C. A.)	485
Bury Town Council, and Gifford		368
Bussey, Hammond *v.*	(C. A.)	79
Byrne, Ex parte. In re Burdett	(C. A.)	310

C.

PAGE

Carson, Merivale *v.* (C. A.) 275
Cater, Monetary Advance Company *v.* 785
Chandler, Wood *v.* 297
Chapman *v.* Withers 824
Childs *v.* Cox 290
Chirney, Finlay *v.* (C. A.) 494
Civil Engineers, In re Duty on Estate of (C. A.) 621
Clark, Bethell *v.* (C. A.) 615
Clarke, Howard *v.* 558
———, London Founders' Association *v.* (C. A.) 576
Clears, Real and Personal Advance Company *v.* (C. A.) 304
Cock, In re. Ex parte Shilson 343
Colin Campbell (Lord), In re (C. A.) 816
Collis *v.* Lewis 202
Colquhoun, Werle *v.* (C. A.) 753
Conder, Ex parte. In re Woodham 40
Connan, In re. Ex parte Hyde (C. A.) 690
Corsbie, Topley *v.* 350
Coulson, Ex parte. In re Gardiner 249
———, Mulleneisen *v.* 667
Cowan *v.* O'Connor 640
Cox, Childs *v.* 290
——, Ex parte (C. A.) 1
Crampton *v.* Ridley 48
Crew *v.* Cummings 535
Crowther, In re. Ex parte Ellis 38
Cuddeford, Ex parte. In re Long (C. A.) 316
Cummings, Crew *v.* 535

D.

Davys *v.* Richardson 722
Deutsche Springstoff Actien Gesellschaft *v.* Briscoe 177
Devonshire (Duke of) *v.* Pattinson (C. A.) 263

PAGE

Dickenson, Arrowsmith *v.* 252
Downs *v.* Salmon 775

E.

Earle, Humphrey *v.* 294
Eaton *v.* Lake (C. A.) 378
Edge, Graham *v.* 538
———, ——— *v.* (C. A.) 683
Edwards, Gloucestershire Banking Company *v.* (C. A.) 107
——— *v.* Lloyd 302
Ellis, Ex parte. In re Crowther 38
Exeter (Town Clerk of), Beal *v.* 300

F.

Farmer *v.* London and North Western Railway Company 788
Farrant, Reg. *v.* 58
Finlay *v.* Chirney (C. A.) 494
Friend *v.* Shaw 374
Fulham Union (Assessment Committee of) *v.* Wells 749

G.

Gardiner, In re. Ex parte Coulson 249
Gifford, and Bury Town Council, In re 368
Glossop, Wilson *v.* (C. A.) 354
Gloucestershire Banking Company *v.* Edwards (C. A.) 107
Governors and Guardians of Kingston-upon-Hull Corporation for the Poor, Winder *v.* 412
Graham *v.* Edge 538
——— *v.* ——— (C. A.) 683
———, Lewis *v.* 780
Great Western Railway Company (Directors of), Reg. *v.* 410
Green, Masters *v.* 807

H.

Hall, Haslam Foundry and Engineering Company *v.* (C. A.) 491

PAGE

Hammond *v.* Bussey (C. A.) 79
Hance *v.* Harding (C. A.) 732
Handyside, Thrussell *v.* 359
Harding, Hance *v.* (C. A.) 732
Haslam Foundry and Engineering Company *v.* Hall (C. A.) 491
Henderson, In re. Ex parte Henderson (C. A.) 509
Hesketh *v.* Bray 589
Highworth and Swindon Union (Guardians of) *v.* Guardians of Westbury-on-Severn Union (C. A.) 597
Hire Purchase Furnishing Company *v.* Richens (C. A.) 387
Holden, In re. Ex parte Official Receiver 43
Holliday, and Mayor, &c., of Wakefield, In re Arbitration between (C. A.) 699
Holmes *v.* Twickenham Local Board of Health (C. A.) 63
Hornby *v.* Silvester (C. A.) 797
Howard *v.* Clarke 558
Humphrey *v.* Earle 294
Hyde, Ex parte. In re Connan (C. A.) 690

I.

Income Tax (Commissioners for Special Purposes of the) Reg. *v.* 549
Inland Revenue (Commissioners of), Mortgage Insurance Corporation *v.* 645
Ipswich Union (Guardians of) *v.* Guardians of West Ham Union 407
Izard, Ex parte. In re Vanderhaege 146

J.

Jagger, Wilkinson *v.* 423
James *v.* Ricknell 164

PAGE

Johnson, In re (C. A.) 68
Jonas *v.* Long (C. A.) 564

K.

Kaye *v.* Sutherland 147
Kellond, Kelly *v.* (C. A.) 569
Kelly *v.* Kellond (C. A.) 569
King, Reg. *v.* (C. A.) 430
Kingston-upon-Hull Corporation for the Poor, Winder *v.* 412
Knowles, Lancashire and Yorkshire Railway Company *v.* (C. A.) 391

L.

Laing, Shrapnel *v.* (C. A.) 334
Lake, Eaton *v.* (C. A.) 378
Lancashire and Yorkshire Railway Company *v.* Knowles (C. A.) 391
———————, Mayor, &c., of Bury *v.* (C. A.) 485
Leduc *v.* Ward (C. A.) 475
Lee *v.* Turner 773
Leek Improvement Commissioners *v.* Justices of the County of Stafford (C. A.) 794
Lewis, Collis *v.* 202
——— *v.* Graham 780
——— *v.* Lewis 56
Lincolnshire (Judge of County Court of), Reg. *v.* 167
Llandaff (Bishop of), Marquis of Abergavenny *v.* 460
Lloyd, Edwards *v.* 302
Long, In re. Ex parte Cuddeford (C. A.) 316
London and County Banking Company *v.* London and River Plate Bank 232
London and North Western Railway Company, Farmer *v.* 788
London and River Plate Bank, London and County Banking Company *v.* 232

		PAGE
London, City of, Union (Guardians of), Guardians of Amersham Union *v.*		103
London Founders' Association *v.* Clarke	(C. A.)	576
Long, In re. Ex parte Cuddeford	(C. A.)	316
——, Jonas *v.*	(C. A.)	564

M.

McClean *v.* Prichard		285
McGregor *v.* McGregor		529
Maples, Weldon *v.*	(C. A.)	331
Masters *v.* Green		807
Matthews *v.* Munster	(C. A.)	141
Medway Union (Guardians of) *v.* Guardians of Bedminster Union		191
Merivale *v.* Carson	(C. A.)	275
Miller, Bridges *v.*		287
Monetary Advance Company *v.* Cater		785
Morgan, Wennhak *v.*		635
Morley, Scott *v.*	(C. A.)	120
Mortgage Insurance Corporation *v.* Commissioners of Inland Revenue		645
Mulleneisen *v.* Coulson		667
Munster, Matthews *v.*	(C. A.)	141

N.

Netherseal Colliery Company, Bourne *v.*	(C. A.)	606
Newbould, In re	(C. A.)	204

O.

O'Connor, Cowan *v.*		640
Official Receiver, Ex parte. In re Holden		43
——————, Ex parte. In re Stephenson		540
Owen, Reg. *v.*		829
——, Thomas *v.*	(C. A.)	225

P.

Pape *v.* Pape		76
Pattinson, Duke of Devonshire *v.*	(C. A.)	263
Peek, Thomas *v.*		727
Pilley *v.* Robinson		155
Pine *v.* Barnes		221
Pollard, In re		160
——, In re	(C. A.)	656
Poulter, Reg. *v.*		132
Prætorius, Anlaby *v.*	(C. A.)	764
Prichard, McClean *v.*		285
Prim *v.* Smith		554
—— *v.* ——	(C. A.)	643

R.

Rankin, In re. Ex parte Rankin		341
Read, Underhay *v.*	(C. A.)	209
Real and Personal Advance Company *v.* Clears	(C. A.)	304
Reeve *v.* Berridge	(C. A.)	523
Reg. *v.* Beckley	(C. C. R.)	187
—— *v.* Buckmaster	(C. C. R.)	182
—— *v.* Commissioners for Special Purposes of the Income Tax		549
—— *v.* Farrant		58
—— *v.* Great Western Railway Company (Directors of)		410
—— *v.* King	(C. A.)	430
—— *v.* Lincolnshire (Judge of County Court of)		167
—— *v.* Owen		829
—— *v.* Poulter		132
—— *v.* St. Marylebone (Vestry of)		415
—— *v.* Shropshire (Judge of County Court of)		242
—— *v.* Wakefield (Mayor, &c., of)		810
—— *v.* Wealand	(C. C. R.)	827
—— *v.* York (Archbishop of)		740
Richardson, Davys *v.*		722
Richens, Hire Purchase Furnishing Company *v.*	(C. A.)	387

	PAGE
Ricknell, James *v.*	164
Riddell, In re. Ex parte Earl of Strathmore	318
———, In re. Ex parte Earl of Strathmore (C. A.)	512
Ridley, Crampton *v.*	48
Robey *v.* Snaefell Mining Company	152
Robinson, Pilley *v.*	155

S.

St. Marylebone (Vestry of), Reg. *v.*	415
Salmon, Downs *v.*	775
Scharrer, In re. Ex parte Tilly (C. A.)	518
Scott *v.* Morley (C. A.)	120
Shaw, Friend *v.*	374
Shilson, Ex parte. In re Cock	343
Shrapnel *v.* Laing (C. A.)	334
Shropshire (Judge of County Court of), Reg. *v.*	242
Silvester, Hornby *v.* (C. A.)	797
Smith, Ex parte. In re Staniar	544
———, In re. Ex parte Brown (C. A.)	321
———, Prim *v.*	554
———, ——— *v.* (C. A.)	643
Snaefell Mining Company, Robey *v.*	152
Stafford (Justices of the County of), Leek Improvement Commissioners *v.*	794
Staniar, In re. Ex parte Smith	544
Stephenson, In re. Ex parte Official Receiver	540
Stevens *v.* Bishop (C. A.)	442
Strathmore (Earl of), Ex parte. In re Riddell	318
———, Ex parte. In re Riddell (C. A.)	512
Suffield and Watts, In re. Ex parte Brown (C. A.)	693
Sutherland, Kaye *v.*	147
Swain *v.* Ayres	585

T.

Taylor *v.* Timson	671
Thomas *v.* Owen (C. A.)	225
——— *v.* Peek	727
Thrussell *v.* Handyside	359
Tilly, Ex parte. In re Scharrer (C. A.)	518
Timson, Taylor *v.*	671
Topley *v.* Corsbie	350
Tunnicliffe *v.* Overseers of Birkdale (C. A.)	450
Turner, Lee *v.*	773
Twickenham Local Board of Health, Bonella *v.* (C. A.)	63
———, Holmes *v.* (C. A.)	63

U.

Underhay *v.* Read (C. A.)	209

V.

Vanderhaege, In re. Ex parte Izard	146
Viney *v.* Bignold	172

W.

Wakefield (Mayor, &c., of), and Holliday, In re Arbitration between (C. A.)	699
———, Reg. *v.*	810
Ward, Leduc *v.* (C. A.)	475
Wealand, Reg. *v.* (C. C. R.)	827
Weldon *v.* Maples (C. A.)	331
Wells, Assessment Committee of Fulham Union *v.*	749
Wennhak *v.* Morgan	635
Werle *v.* Colquhoun (C. A.)	753
West Ham Union (Guardians of), Guardians of Ipswich Union *v.*	407
Westbury-on-Severn Union (Guardians of), Guardians of Highworth and Swindon Union *v.* (C. A.)	597

		PAGE
Whiteley *v.* Barley		196
Wilson *v.* Glossop	(C. A.)	354
Wilkinson *v.* Jagger		423
Winder *v.* Governors and Guardians of Kingston-upon-Hull Corporation for the Poor		412
Withers, Chapman *v.*		824
Witt *v.* Banner	(C. A.)	114
Wood *v.* Chandler		297
Woodhall, Ex parte	(C. A.)	832
Woodham, In re. Ex parte Conder		40

Y.

York (Archbishop of), Reg. *v.*		740

TABLE OF CASES CITED.

A.

		PAGE
Abbott *v.* Greenwood	7 Dowl. 534	766
Agnew *v.* Usher	14 Q. B. D. 78	148, 149, 150, 151
Ahrbecker *v.* Frost	17 Q. B. D. 606	337
Albany *v.* The Bishop of St. Asaph	Croke Eliz. 119	469, 471
Alton *v.* Midland Railway Company	19 C. B. (N.S.) 213	497
Amersham Union (Guardians of Poor of) *v.* Guardians of Poor of City of London Union	20 Q. B. D. 103	600
Angel *v.* Smith	9 Ves. 335	216
Anon.	3 Wils. 124	123
Anonymous	1 Salk. 396	60
Appleby *v.* Myers	Law Rep. 2 C. P. 651	826
Appleford's Case	1 Mod. 83	743
Asher *v.* Calcraft	18 Q. B. D. 607	673, 681
Ashley *v.* Pratt	16 M. & W. 471	478
Atkinson *v.* Ritchie	10 East, 530	826
Attorney-General *v.* Mayor of Norwich	2 My. & Cr. 406	45

B.

Bailey *v.* Birchall	2 H. & M. 371	695
Baines, In re	1 Cr. & Ph. 31	8
——— *v.* Bromley	6 Q. B. D. 691	337, 339
Baker *v.* Smith	Styles, 295	505
——— *v.* Thorogood	2 Curt. Eccl. Rep. 632	7, 8, 12, 18, 21, 30, 36
——— *v.* Town Clerk of Monmouth	53 L. T. (N.S) 668	303, 304
Banne River Case	Davies, 149	267
Barlow *v.* Teal	15 Q. B. D. 403	376, 377
Barry *v.* Robinson	1 New Rep. (Bos. & Pul.) 293	496, 503
Bartlett *v.* Stinton	Law Rep. 1 C. P. 483	766, 768
Batchelor *v.* Fortescue	11 Q. B. D. 474	360
Bateman *v.* Ball	56 L. J. (Q. B. D.) 291	388, 389
Bates *v.* Townley	2 Ex. 165	54
Baxendale *v.* London, Chatham, and Dover Railway Company	Law Rep. 10 Ex. 35	82, 83, 84, 85, 91, 92, 99, 101, 102
Bayley *v.* Great Western Railway Company	26 Ch. D. 434	228
——— *v.* Potts	8 A. & E. 272	317
Beaufort (Duke of) *v.* Mayor of Swansea	3 Ex. 425	275
Becke *v.* Wells	1 C. & M. 75	162
Beckett *v.* Corporation of Leeds	Law Rep. 7 Ch. 421	273

		PAGE
Beckham *v.* Drake	2 H. L. C. 579	496
Bell, Ex parte. In re Webb	1 G. & J. 282	542
Bermingham *v.* Sheridan	33 Beav. 660	577
Berndtson *v.* Strang	Law Rep. 4 Eq. 481	620
Berridge *v.* Ward	10 C. B. (N.S.) 400	268
Besant *v.* Wood	12 Ch. D. 605	530, 533
Beswick *v.* Boffey	9 Ex. 315	203
Bevins *v.* Hulme	15 M. & W. 88	165
Beynon *v.* Jones	15 M. & W. 566	127
Bianchi *v.* Offord	17 Q. B. D. 484	306, 307, 308, 309, 310, 351, 352, 353
Bidder *v.* North Staffordshire Railway Company	4 Q. B. D. 412	720
Biffin *v.* Yorke	5 M. & G. 428	327, 328, 329
Bird *v.* Smith	Moore, 781	747
Birmingham and District Land Company *v.* London and North Western Railway Company	34 Ch. D. 261	84, 91, 97, 101
Blanchett, Ex parte. In re Keeling	17 Q. B. D. 303	251
Blowers *v.* Rackham	20 L. J. (Q.B.) 397	565
Bollen *v.* Southall	15 Q. B. D. 461	298
Boodle *v.* Campbell	7 M. & G. 386	220
Bradshaw *v.* Lancashire and Yorkshire Railway Company	Law Rep. 10 C. P. 189	497
Breull, Ex parte. In re Bowie	16 Ch. D. 484	780, 781, 782
Brewer *v.* Broadwood	22 Ch. D. 105	526
Briggs *v.* Boss	Law Rep. 3 Q. B. 268	774
Bristow *v.* Cormican	3 App. Cas. 641	267
British India Steam Navigation Company *v.* Commissioners of Inland Revenue	7 Q. B. D. 165	647, 649
British Waggon Company *v.* Lea	5 Q. B. D. 149	388
Brookes *v.* Earl of Rivers	Hardr. 503	60
Brown, Ex parte. In re Yates	11 Ch. D. 148	38
——— *v.* Storey	1 M. & G. 117	212, 213, 214, 215
Brumfit *v.* Morton	3 Jur. (N.S.) 1198	526
Bryan *v.* Child	5 Exch. 368	323
Buckley *v.* Hann	5 Ex. 43	780, 781
Bulley *v.* Bulley	8 Ch. D. 479	695
Burdett, In re. Ex parte Byrne	20 Q. B. D. 310	786
Burgess, In re	4 Morell's Bankruptcy Cases, 190	820
——— *v.* Clark	14 Q. B. D. 735	198, 199, 201
Burroughes *v.* Clarke	1 Dowl. 48	52
Bursill *v.* Tanner	13 Q. B. D. 691	123
Burton *v.* Henson	10 M. & W. 105	673, 678
Byerley *v.* Windus	5 B. & C. 1	673, 678
Byrne *v.* Van Tienhoven	5 C. P. D. 344	640

C.

Caledonian Railway Company *v.* Lockhart	3 Macq. 808	135, 139
——— *v.* Sprot	2 Macq. 449	397
——— *v.* Walker's Trustees	7 App. Cas. 259	716
Campbell, Ex parte. In re Wallace	15 Q. B. D. 213	547
——— *v.* Spottiswoode	3 B. & S. 769	277, 278, 279, 280, 281, 284

		PAGE
Capel *v.* Child	2 C. & J. 558	472
Carpenter *v.* Parker	27 L. J. (C.P.) 78	217
Carr *v.* Hood	1 Camp. 355	277
—— *v.* Stringer	E. B. & E. 123	565, 566, 568
Carter *v.* Murcot	4 Burr. 2163	267
Cash *v.* Wells	1 B. & Ad. 375	767, 769
Chaffers, In re	15 Q. B. D. 467	161
Chamberlain *v.* Williamson	2 M. & S. 408	495, 496, 497, 499, 505, 506, 507
Chaplin, Ex parte	26 Ch. D. 319	736
Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Company	10 Q. B. D. 521	480, 483
Chinery, Ex parte. In re Chinery	12 Q. B. D. 342	320, 513, 517
Clarkson *v.* Parker	7 Dowl. 87	161
Clerk *v.* Withers	6 Mod. 295	108
Coates *v.* Railton	6 B. & C. 422	619
Collen *v.* Wright	8 E. & B. 647	84, 90, 91, 98
Collins *v.* Locke	4 App. Cas. 674	173, 175, 176
Collis *v.* Selden	Law Rep. 3 C. P. 495	360, 366
Colonial Bank *v.* Whinney	30 Ch. D. 261; 11 App. Cas. 426	577
Coltness Iron Company *v.* Black	6 App. Cas. 315	444
Conolan *v.* Leyland	27 Ch. D. 632	123
Cooke *v.* Gill	Law Rep. 8 C. P. 107	641
Coomber *v.* Justices of Berks	9 App. Cas. 61	454
Coombs, In re	4 Ex. 841	53
Cooper *v.* Busbridge	16 L. T. (N.S.) 5	565
——— *v.* Chitty	1 W. Bl. 65	108, 113
——— *v.* Lloyd	6 C. B. (N.S.) 519	355
Corbett *v.* Plowden	25 Ch. D. 678	211
Core *v.* James	Law Rep. 7 Q. B. 135	772
Corven's Case	12 Rep. 105	673
Cosser *v.* Collinge	3 M. & K. 283	525, 527
Costa Rica (Republic of) *v.* Erlanger	46 L. J. (Ch.) 375	71
Counsell *v.* London and Westminster Loan and Discount Company	19 Q. B. D. 512	785, 786, 787
Cox, Ex parte	19 Q. B. D. 307	2
——, Ex parte	20 Q. B. D. 1	833
—— *v.* Kitchin	1 B. & P. 338	355
Crabb, Ex parte. In re Palmer	8 De G. M. & G. 277	735
Creen *v.* Wright	2 C. P. D. 354	336
Croft *v.* London and North Western Railway Company	33 L. J. (Q.B.) 113	135, 139
Cromford Canal Company *v.* Cutts	5 Railway Cases, 442	396, 404, 704
Crooks *v.* Allan	5 Q. B. D. 38	478
Crosser *v.* Maxwell	W. N. (1885), 95	571
Crossley *v.* Lightowler	Law Rep. 3 Eq. 279	268
Crouch *v.* Crédit Foncier of England	Law Rep. 8 Q. B. 374	240, 241
Crowther *v.* Bradney	15 C. B. (N.S.) 536	298
Croydon Union (Guardians of) *v.* Guardians of Reigate Union	19 Q. B. D. 385	105
Curtis *v.* Price	12 Ves. 89	45

D.

Daglish, Ex parte	Law Rep. 8 Ch. 1072	312
Dale, Ex parte	33 W. R. 476	342
Dale's Case	6 Q. B. D. 376	11

		PAGE
Dallow *v.* Garrold	14 Q. B. D. 543	695, 696, 698
Daubeney, Ex parte. In re Briden	2 Dea. 72	736, 739, 740
Davenport *v.* Whitmore	2 My. & Cr. 177	312
Davey *v.* Shannon	4 Ex. D. 81	530, 531
Davies *v.* Rees	17 Q. B. D. 408	311, 312, 313, 315, 786, 787
Davis *v.* Burton	11 Q. B. D. 537	352
—— *v.* Duncan	Law Rep. 9 C. P. 396	278
—— *v.* Garrett	6 Bing. 716	478
Dawdy, In re	15 Q. B. D. 426	370
Dawson *v.* Fox	14 Q. B. D. 377	203
——— *v.* Lord Otho FitzGerald	1 Ex. D. 257	174, 177
De la Pole *v.* Dick	29 Ch. D. 351	165
"Delaware," The	14 Wallace, 579	478
Dean *v.* Green	8 P. D. 79	8, 11, 30
Dennis *v.* Dennis	In note to Turton *v.* Turton, 3 Hag. Ecc. 348	355
Dibdin *v.* Swan	1 Esp. 28	277, 278
Dickens *v.* Dickens	31 L. J. (P. & M.) 183	510
Dickin, Ex parte. In re Pollard	8 Ch. D. 377	38
Dickson *v.* Reuter's Telegram Company	2 C. P. D. 62	360
Dillon *v.* Cunningham	Law Rep. 8 Ex. 23	122, 250
Dimes *v.* Proprietors of Grand Junction Canal	3 H. L. C. 759	60, 61
Dimmack *v.* Bowley	2 C. B. (N.S.) 542	323
Dixon *v.* Baldwen	5 East, 175	616, 619
Doe *d.* Cardigan *v.* Roe	1 D. & R. 540	375
—— *d.* Carter *v.* Roe	10 M. & W. 670	376
—— *d.* Child *v.* Willis	5 Ex. 894	473
—— *d.* Cundey *v.* Sharpley	15 M. & W. 558	375
—— *v.* Donston	1 B. & Ald. 230	108, 112
—— *d.* Freeland *v.* Burt	1 T. R. 701	230, 273
—— *d.* Lloyd *v.* Powell	5 B. & C. 308	542
—— *d.* Pitcher *v.* Anderson	5 M. & S. 161	542
—— *d.* Pulteney *v.* Lady Cavan	5 T. R. 567	417
—— *d.* Tindal *v.* Roe	2 B. & Ad. 922	375
Dr. Bentley's Case	1 Strange, 557	472
Draycott *v.* Harrison	17 Q. B. D. 147	121, 122, 127, 565
Dressler, Ex parte	9 Ch. D. 352	686
Drew *v.* Drew	1 Notes of Cas. Ecc. & Mar. 315	355
Dudley Canal Navigation Company *v.* Grazebrook	1 B. & Ad. 59	397, 398, 401, 403, 406
——— (Corporation of), In re	8 Q. B. D. 86	397
Dunn *v.* Birmingham Canal Company	Law Rep. 7 Q. B. 244	397
Dunston *v.* Paterson	5 C. B. (N.S.) 267	781
Dutton *v.* Thompson	23 Ch. D. 278	45

E.

East London Railway Company *v.* Whitechurch	Law Rep. 7 H. L. 90	791
Eastland *v.* Burchell	3 Q. B. D. 432	357
Easton (Overseers of) *v.* Overseers of St. Mary, Marlborough	Law Rep. 2 Q. B. 128	602
Eastwood *v.* Holmes	1 F. & F. 347	277
Edmonton (Guardians of) *v.* Guardians of St. Mary, Islington	15 Q. B. D. 95	104

		PAGE
Edwards *v.* Martyn	17 Q. B. 693	122, 128
Eidsforth *v.* Farrer	4 C. B. 9	298, 299
Eley *v.* Positive Life Assurance Company	1 Ex. D. 20	530
Elliott *v.* Royal Exchange Assurance Company	Law Rep. 2 Ex. 237	173, 176
Elsey *v.* Cox	26 Beav. 95	45
Elston *v.* Rose	Law Rep. 4 Q. B. 4	168
Emanuel and Simmonds, In re	33 Ch. D. 40	206, 207, 208
Emmanuel *v.* Bridger	Law Rep. 9 Q. B. 286	323
Emmerson's Case	Law Rep. 1 Ch. 433	577
Erichsen *v.* Last	8 Q. B. D. 414	757, 759
Etherington *v.* Parrot	1 Salk. 118	355
Evans *v.* Elliott	9 A. & E. 342	211, 212, 213, 216
—— *v.* Wood	Law Rep. 5 Eq. 9	578
Ewart *v.* Cochrane	4 Macq. 117	232

F.

Faithfull *v.* Ewen	7 Ch. D. 495	695, 696
Farrow *v.* Mayes	18 Q. B. 516	322, 328, 329
Faulkner, In re	36 Ch. D. 566	206, 208, 209
Fearon *v.* Norvall	5 D. & L. 439	376
Field, In re	29 Ch. D. 608	206, 207, 208
—— *v.* Great Northern Railway Company	3 Ex. D. 261	336
Fisher *v.* Val de Travers Asphalte Company	1 C. P. D. 511	83, 92
Fitzgerald *v.* Fitzgerald	Law Rep. 1 P. & D. 694	78
Flight *v.* Booth	1 Bing. (N. C.) 371	526
Ford *v.* Drew	5 C. P. D. 59	301, 302
—— *v.* Hart	Law Rep. 9 C. P. 273	301
Foreman, Ex parte. In re Hann	18 Q. B. D. 393	342
Forrer *v.* Nash	35 Beav. 167	526
Fosberry *v.* Waterford and Limerick Railway Company	13 Ir. Com. Law, 494	487
Foster *v.* Wright	4 C. P. D. 438	268
Foulger *v.* Taylor	1 L. T. (N.S.) 57	777
Fraser *v.* Ehrensperger	12 Q. B. D. 310	179
—— *v.* Telegraph Construction Company	Law Rep. 7 Q. B. 566	480, 483
Freeland *v.* Neale	1 Rob. 643	672, 678
French *v.* French	6 De G. M. & G. 95	542
Fulham Board *v.* Goodwin	1 Ex. D. 400	65, 67
Fuller *v.* Lane	2 Addams, 419	672, 677
Furber *v.* Cobb.	18 Q. B. D. 494	352, 353, 570

G.

Glave *v.* Harding	27 L. J. (Ex.) 286	228
Glyn, Mills, & Co. *v.* East and West India Dock Company	7 App. Cas. 591	478, 480
Godwin *v.* Francis	Law Rep. 5 C. P. 295	85
Goldstrom *v.* Tallerman	18 Q. B. D. 1	306, 307, 309, 310, 351, 352, 571
Goodwin *v.* Robarts	Law Rep. 10 Ex. 337 & 1 App. Cas. 476	241
Goodtitle *v.* Millburn	2 M. & W. 853	799
Gorgier *v.* Mieville	3 B. & C. 45	238

		PAGE
Govier *v.* Hancock	6 T. R. 603	355
Gowan *v.* Wright	18 Q. B. D. 201	323
Grant *v.* Royal Exchange Assurance Company	5 M. & S. 439	57
Great Eastern Railway Company *v.* Hackney District Board	8 App. Cas. 687	487
Great Western Railway Company *v.* Bennett	Law Rep. 2 H. L. 27	395, 706
Grébert-Borgnis *v.* Nugent	15 Q. B. D. 85	85, 91, 94
Green *v.* Lord Penzance	6 App. Cas. 657	11, 37
Greer *v.* Young	24 Ch. D. 545	695
Greig *v.* University of Edinburgh	Law Rep. 1 Sc. App. 348	458
Grosvenor *v.* Green	28 L. J. (Ch.) 173	525, 526, 527
Groves *v.* Rector of Hornsey	1 Hagg. Cons. 188	672, 677

H.

Hadley *v.* Baxendale	9 Ex. 341	81, 82, 83, 84, 87, 90 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 500, 501, 507
Hall *v.* Lund	1 H. & C. 676	228, 232
—— *v.* Smith	14 Ves. 426	525
—— *v.* Wright	E. B. & E. 746	497
Hambly *v.* Trott	1 Cowp. 371	497, 503
Hamlyn *v.* Betteley	6 Q. B. D. 63	166, 167, 203
Hanmer *v.* King	57 L. J. 367	426
Hanson *v.* Stevenson	1 B. & Ald. 303	686
Harlock *v.* Ashberry	19 Ch. D. 84	333
Harris *v.* May	12 Q. B. D. 97	772
——— *v.* Morris	4 Esp. 41	358
Harrison *v.* Cage	Carthew, 467	505
——— *v.* Carter	2 C. P. D. 26	303
Hassall *v.* Lawrence	Times Rep. Nov. 2, 1887, p. 23	153
Hatton *v.* Kean	7 C. B. (N.S.) 268	381, 384, 385
Hayman *v.* Governors of Rugby School	Law Rep. 18 Eq. 28	473
Haymes *v.* Cooper	33 Beav. 431	698
Head *v.* Tattershall	Law Rep. 7 Ex. 7	825
Headington Union, Guardians of *v.* Guardians of St. Olave's Union	13 Q. B. D. 293	105
Heaven *v.* Pender	11 Q. B. D. 503	363
Hebden *v.* Rutter	Sid. 180	505
Henwood *v.* Harrison	Law Rep. 7 C. P. 606	277, 278, 282
Hetherington *v.* Groome	13 Q. B. D. 789	307
Hewitt, In re	15 Q. B. D. 159	38
——— *v.* Blumer	3 Times Reports, 221	339
Hibbs *v.* Wilkinson	1 F. & F. 608	277, 278
Hickman *v.* Machin	4 H. & N. 716	211, 217, 220
Hill, Ex parte, In re Lane	17 Q. B. D. 74	774
—— *v.* East and West India Dock Company	9 App. Cas. 448	346
—— *v.* Grange	1 Plowd. 170	232
Hillman, Ex parte, In re Pumfrey	10 Ch. D. 622	735, 736, 738, 739
Hinchcliffe *v.* Barwick	5 Ex. D. 177	825
Hinks, Re, Ex parte Verdi	3 Morrell, 218	344
Hobson *v.* Sherwood	19 Beav. 575	216
Hodgkinson *v.* Kelly	Law Rep. 6 Eq. 496	578
Hoggins *v.* Gordon	3 Q. B. 466	53
Hoile *v.* Scales	2 Hag. Eccl. Rep. 566	9

		PAGE
Holborn Guardians of *v.* Guardians of Chertsey	14 Q. B. D. 289	599, 600, 601, 602
Holford *v.* Bailey	13 Q. B. 426	267
Holland, Ex parte, In re Heneage	Law Rep. 9 Ch. 307	250
Holmes *v.* Holmes	2 Lee Ecc. Ca. 116	356
Home *v.* Earl Camden	2 H. Bl. 533	60
Hormsby *v.* Robson	26 L. J. (C. P.) 55	292
Hornby *v.* Cardwell	8 Q. B. D. 329	83, 97
Hornsby *v.* Close	Law Rep. 2 Q. B. 153	414
Hovey *v.* Page	55 Maine, 142	495, 505
Howes *v.* Young	1 Ex. D. 146	317
Hudson *v.* Tooth	2 P. D. 125	8, 11, 30
Hunt *v.* Hunt	4 D. F. & J. 221	533
Hutton *v.* Fowke	1 Keb. 648	60
Hyde *v.* Warden	7 Ex. D. 72	525, 526, 527, 528
Hydraulic Engineering Company *v.* McHaffie	4 Q. B. D. 670	85, 97
Hynd *v.* Spowart	22 Scottish Law Rep. 702	609, 610

I.

Ide, Ex parte	17 Q. B. D. 755	691
Ince Hall Rolling Mills Company *v.* Douglas Forge Company	8 Q. B. 179	388
Indermaur *v.* Dames	Law Rep. 1 C. P. 274, and Law Rep. 2 C. P. 311	360
Inderwick, Re	54 L. J. (Ch.) 72	665
Ivens *v.* Butler	7 E. & B. 159	122
Izard, Ex parte	20 Ch. D. 703	520

J.

James *v.* Howarth	5 C. P. D. 225	298
——— *v.* Plant	4 Ad. & E. 749	229
Jarmain *v.* Hooper and Heenan	6 M. & G. 827	165
Johnson *v.* Jones	9 A. & E. 809	217, 219, 220, 221
Jones, Ex parte. In re Grissell	12 Ch. D. 484	250, 251
——— *v.* Jones	14 Ch. D. 593	369, 371
——— *v.* Pritchard	Law Rep. 4 C. P. 414	295
——— *v.* Robin	10 Q. B. 620	148, 149, 151
Jortin *v.* South Eastern Railway Company	6 D. M. & G. 275	314
Johnson, In re	20 Ch. D. 389	736
Julius *v.* The Lord Bishop of Oxford	5 App. Cas. 214	473

K.

Kay *v.* Oxley	Law Rep. 10 Q. B. 360	229, 231
Kaye, Ex parte	1 B. & Ad. 652	9
Kearney *v.* London, Brighton and South Coast Railway Company	Law Rep. 5 Q. B. 411, and Law Rep. 6 Q. B. 759	360
Kearsley, Ex parte. In re Genese	18 Q. B. D. 168	547
Keech *v.* Hall	Dougl. 21	214, 217
Kellett *v.* Local Board of Health of Tranmere	34 L. J. (Q.B.) 87	369
Kemp *v.* Tucker	Law Rep. 8 Ch. 369	686

		PAGE
Kendal *v.* Marshall Stevens & Co.	11 Q. B. D. 356	616, 619
——— *v.* Hamilton	4 App. Cas. 504	156, 157, 158, 159
Kerrison *v.* Cole	8 East, 231	311
Keynsham Union *v.* Bedminster Union	3 Q. B. D. 344	104
King *v.* Hoare	13 M. & W. 494	158, 159
Kingsbridge Union, Guardians of *v.* Guardians of East Stonehouse	18 Q. B. D. 528	104
Knights *v.* Quarles	2 B. & B. 102	497
Knowles *v.* Holden	24 L. J. (Ex.) 223	248
Knowlman *v.* Bluett	Law Rep. 9 Ex. 307	534

L.

Langley *v.* Hammond	Law Rep. 3 Ex. 161	231
Larkin *v.* Marshall	4 Ex. 804	128
Latham *v.* Reg.	33 L. J. (M.C.) 197	830
Lattimore *v.* Simmons	13 Sergeant & Rawle (Penn.), 183	495, 505
Lavie *v.* Phillips	3 Burr. 1776	250
Lawrence *v.* Harrison	Style, 426	165
Legard *v.* Johnson	3 Ves. 352	531, 533
Leggott *v.* Great Northern Railway Company	1 Q. B. D. 599	497
Le Tailleur *v.* South Eastern Railway Company	3 C. P. D. 18	780
Lewis *v.* Evans	Law Rep. 10 C. P. 297	292
——— *v.* Peake	7 Taunt. 153	84, 85, 91
Leyland *v.* Stewart	4 Ch. D. 419	381
Linton *v.* Linton	15 Q. B. D. 239	122, 510
Liverpool Loan Company, Ex parte	Law Rep. 7 Ch. 732	317
Logan *v.* Hall	4 C. B. 598	84
Longdill *v.* Jones	1 Stark. 345	108
London and North Western Railway Company *v.* Skirton	5 B. & S. 559	487
——— and Yorkshire Bank *v.* Belton	15 Q. B. D. 457	808
London, Bombay, and Mediterranean Bank, Limited, In re	36 L. J. (Ch.) 785	388
——— Mayor of *v.* Cox	Law Rep. 2 H. L. 239	247
Lord *v.* Commissioners of Sydney	12 Moo. P. C. 473	268
Lowry *v.* Russell	8 Pickering, 360	477
Luckyn *v.* Hambyn	18 W. R. 43	777, 779
Lumley *v.* Simmonds	34 Ch. D. 698	571
Lund *v.* Campbell	14 Q. B. D. 821	336
Lyon *v.* Morris	19 Q. B. D. 139	352

M.

Mackenzie *v.* Ascot Gas Company	17 Q. B. D. 114	369
McHardy *v.* Liptrott	19 Q. B. D. 151	168
McHattie, Ex parte. In re Wood	10 Ch. D. 398	774, 776, 778
Macleod *v.* Wakley	3 C. & P. 311	278, 283
Maidstone Union, Guardians of *v.* Guardians of Holborn Union	17 Q. B. D. 817	105, 193
Malcolmson *v.* O'Dea	10 H. L. C. 593	268
Manby *v.* Scott	2 Sm. L. C. 9th ed., 466	355

		PAGE
Manning *v.* Eastern Counties Railway Company	12 M. & W. 237	799
Mansel *v.* Norton	22 Ch. D. 769	148, 149
Maple *v.* Earl of Shrewsbury and Talbot	19 Q. B. D. 463	724
March, In re. Mander *v.* Harris	24 Ch. D. 222	531
Marshall *v.* Bishop of Exeter	7 C. B. (N.S.) 653	747, 748
——— *v.* Marshall	5 P. D. 19	533
——— *v.* Ulleswater Steam Navigation Company	3 B. & S. 742	267
Martin *v.* Cotter	3 J. & Lat. 496	525
——— *v.* Mackonochie	4 Q. B. D. 697	7
Mason *v.* Brentini	15 Ch. D. 287	337
——— *v.* Wirral Highway Board	4 Q. B. D. 459	168, 203
Mast *v.* Goodson	2 W. Bl. 848.	504
Maxted *v.* Paine	Law Rep. 6 Ex. 132	578
May *v.* Babcock	4 Ohio, 334	478
Meager *v.* Pellew	14 Q. B. D. 973	121
Medwin, Ex parte	1 E. & B. 609	60
Melliss *v.* Shirley Local Board	16 Q. B. D. 446	198, 199, 201
Mersey Docks Case	11 H. L. C. 443	451, 453, 454, 455, 456, 458, 459
Metropolitan Bank *v.* Pooley	10 App. Cas. 210	333
Metropolitan Board of Works *v.* Steed	8 Q. B. D. 445	556, 644
Meux *v.* Jacobs	Law Rep. 7 H. L. 481	312, 313
Micklethwaite *v.* Newlay Bridge	33 Ch. D. 133	273
Middleton *v.* Croft	2 Str. 1056 a	747, 748
Miles, Ex parte	15 Q. B. D. 39	616, 619
Miller, Re	11 W. R. 374	317
——— *v.* Race	1 Sm. L. C. 491, 9th ed.	238
Mills *v.* Bailey	2 H. & C. 36	179, 180
Mill's Estate, In re	34 Ch. D. 34	720
Montague *v.* Benedict	3 B. & C. 635	357
Moore, Ex parte. In re Faithfull	14 Q. B. D. 627	319, 320, 509, 510, 511, 512, 513, 514, 515, 517
Morgan *v.* Hardy	18 Q. B. D. 646	344
Mors le Blanch *v.* Wilson	Law Rep. 8 C. P. 227	82, 101, 102
Moss *v.* Gallimore	1 Sm. L. C. 612, 9th ed.	211, 217
Murray *v.* Stephenson	19 Q. B. D. 60	766

N.

Needham *v.* Johnson	15 W. R. 346	774
Neill *v.* Duke of Devonshire	8 App. Cas. 135	268
Newcastle-under-Lyne Turnpike Roads, Trustees of, *v.* North Staffordshire Railway Company	5 H. & N. 160	487
Newman *v.* Merriman	26 L. T. (N.S.) 397	728
Newton *v.* Boodle	9 Q. B. 948	122, 127
Nicholas *v.* Chamberlain	Cro. Jac. 121	232
Norris *v.* Pilcher	Law Rep. 4 C. P. 417	295
North of England Railway Company *v.* Langbaurgh	24 L. T. 544	487
North Staffordshire Railway Company *v.* Dale	8 E. & B. 836	487
Norton *v.* Fazan	1 B. & P. 226	355
Noyes *v.* Pollock	32 Ch. D. 53	216
Nunn *v.* Varty	3 Cur. 352	672, 678

O.

		PAGE
O'Dwyer, In re	19 Ir. Law Rep. 19	312, 313
Official Receiver, Ex parte. In re Gould.	19 Q. B. D. 92	38
——— In re Morritt	18 Q. B. D. 222	307
Oliver's Case	2 Russell on Crimes, 169, 5th ed.	185
Oram *v.* Cole	34 L. J. (C. P.) 52	298
Orrell Colliery Company, Ex parte	12 Ch. D. 681	320

P.

Paine *v.* Hutchinson	Law Rep. 3 Ch. 388	578
Palliser *v.* Gurney	19 Q. B. D. 519	530, 531, 532
Paradine *v.* Jane	Aleyn, 27	825
Paris *v.* Levy	9 C. B. (N.S.) 342	277
Parkes *v.* Smith	15 Q. B. 297	179
Paston's Case	Littleton, 264	800
Payne *v.* Mayor and Corporation of Brecon	3 H. & N. 572	313
Pearce *v.* Chaplin	9 Q. B. 802	766
Pearson *v.* Cox	2 C. P. D. 369	360
Peer *v.* Humphrey	2 A. & E. 495	238
Penley *v.* Watts	7 M. & W. 601	84
Pettman *v.* Bridger	1 Phill. 316	672, 677
Pheysey *v.* Vicary	16 M. & W. 484	229
Phillips *v.* Homfray	24 Ch. D. 439	497, 504
Pickering *v.* Ilfracombe Railway Company	Law Rep. 3 C. P. 250	313, 315
Piercy *v.* Young	14 Ch. D. 200	178, 179
Pike *v.* FitzGibbon	17 Ch. D. 454	122
Pinchon's Case	9 Rep. 88 a	496, 503, 504
Pink *v.* De Thuisey	2 Madd. 157	171
Pinkerton *v.* Easton	Law Rep. 16 Eq. 490	695
Plant *v.* James	5 B. & Ad. 791	229
Playfair *v.* Musgrove	14 M. & W. 239	41
Polden *v.* Bastard	Law Rep. 1 Q. B. 156	229, 231
Pommery *v.* Apthorpe	56 L. J. (Q.B.D.) 155	757, 760
Poole *v.* Canning	Law Rep. 2 C. P. 241	122, 250
Pope, In re	17 Q. B. D. 743	212, 216
—— *v.* Biggs	9 B. & C. 245	217
—— *v.* Garland	4 Y. & C. Ex. 394	525
Potter *v.* Metropolitan District Railway Company	30 L. T. 765	497
Pountney *v.* Clayton	11 Q. B. D. 820	395, 397, 706
Powell *v.* Guest	18 C. B. (N.S.) 72	301
——— *v.* Hoyland	6 Ex. 67	184
Prescott *v.* Prescott	20 L. T. (N.S.) 331	510
Prestwich *v.* Poley	18 C. B. (N.S.) 806	142
Pulling *v.* Great Eastern Railway Company	9 Q. B. D. 110	497
Purvis, Re	56 L. T. (N.S.) 579	519, 520, 521, 523

R.

Ramshay, Ex parte	21 L. J. (Q.B.) 238	472
Randall *v.* Raper	E. B. & E. 84	85
Randell *v.* Thompson	1 Q. B. D. 748	179, 180, 181
Randolph *v.* Milman	Law Rep. 2 C. P. 60	743

		PAGE
Raymond *v.* Fitch	2 C. M. & R. 588	496
Reed, Ex parte. In re Reed	16 Q. B. D. 244	547
Reg. *v.* Alcock	37 L. T. (N.S.) 829	60
—— *v.* Bridgnorth, Guardians of	11 Q. B. D. 314	104, 193, 604
—— *v.* Cambridge, Recorder of	8 E. & B. 637	60, 61
—— *v.* Catley	19 Q. B. D. 491	426
—— *v.* Central Criminal Court, Justices of	18 Q. B. D. 314	833
—— *v.* Christchurch	18 L. J. (M.C.) 28	408, 409
—— *v.* Claxby	24 L. J. (Q.B.) 223	795
—— *v.* Cluworth	1 Salk. 358	797
—— *v.* Cookham Union	9 Q. B. D. 522	78
—— *v.* Darlington Free Grammar School, Governors of	6 Q. B. 682	473
—— *v.* Edmonton	15 Q. B. D. 339	193
—— *v.* Fletcher	2 Q. B. D. 43	835
—— *v.* Foote	10 Q. B. D. 378	834
—— *v.* Fuidge	33 L. J. (M.C.) 74	830
—— *v.* Gibson	18 Q. B. D. 537	830
—— *v.* Glossop, Inhabitants of	12 Q. B. 117	193, 194, 195, 602
—— *v.* Goodchild	1 E. B. & E. 1	445
—— *v.* Great Yarmouth, Justices of	8 Q. B. D. 525	60
—— *v.* Handsley	8 Q. B. D. 383	60, 61
—— *v.* High Halden	1 F. & F. 678	795
—— *v.* Hughes	4 Q. B. D. 614	189
—— *v.* Kettle	17 Q. B. D. 761	428, 429
—— *v.* Leeds Union	4 Q. B. D. 323	599
—— *v.* Mainwaring	E. B. & E. 474	434
—— *v.* Manchester, Overseers of	8 Q. B. D. 50	192, 602
—— *v.* Metropolis, Justices of General Assessment Sessions for the	17 Q. B. D. 394	750
—— *v.* Meyer	1 Q. B. D. 173	61
—— *v.* Middlesex, Justices of	2 Q. B. D. 516	434
—— *v.* Pirehill North, Justices of	14 Q. B. D. 13	434, 436
—— *v.* Poole, Mayor, &c., of	19 Q. B. D. 602	813, 815
—— *v.* Rand	Law Rep. 1 Q. B. 230	61
—— *v.* St. Anne, Blackfriars	22 L. J. (M.C.) 137	602
—— *v.* St. George's in the East	Law Rep. 5 Q. B. 364	193, 194
—— *v.* St. Giles in the Fields, Overseers of	30 L. J. (M.C.) 12	602
—— *v.* St. Leonard, Shoreditch, Inhabitants of	6 B. & S. 784	602
—— *v.* St. Mary, Islington	31 L. J. (M.C.) 233	255
—— *v.* St. Olave's Union	Law Rep. 9 Q. B. 38	600
—— *v.* Shavington-cum-Gresty	20 L. J. (M.C.) 194	255
—— *v.* Smith	5 Q. B. 614	472
—— *v.* Steel	2 Q. B. D. 37	834, 835, 837
—— *v.* Swindon Local Board	4 Q. B. D. 305	418, 420, 421, 423
—— *v.* Thorogood	12 A. & E. 183	7, 11, 29, 36
—— *v.* Tooke	48 J. P. 661	60
—— *v.* Weil	9 Q. B. D. 701	834
—— *v.* West Derby	Law Rep. 10 Q. B. 283	454, 455, 459
Remfrey *v.* Butler	E. B. & E. 887	578
Rex *v.* Almon	Wilmot's Notes, 243	72
—— *v.* Coleridge	2 B. & Ald. 806	743
—— *v.* Downshire, Marquis of	A. & E. 698	799
—— *v.* Elvet	2 E. & E. 266	599, 600, 601, 602
—— *v.* Ely, Bishop of	2 Term Rep. 290	743
—— *v.* Faulkner	2 C. M. & P. 525	70

		PAGE
Rex *v.* Flintan	1 B. & Ad. 227	355
—— *v.* Gaskin	8 T. R. 209	472
—— *v.* Harwood	2 Ld. Raym. 1405	744
—— *v.* Mashiter	6 A. & E. 153	673
—— *v.* Much Cowarne, Inhabitants of	2 B. & Ad. 861	600
—— *v.* Robson	MS. Bayley, J.; R. & R. 413	186
—— *v.* Rodman	Cro. Car. 198	9
—— *v.* St. Peter's, Thetford, Churchwardens of	5 Term Rep. 364	743
—— *v.* Taylor	1 Phill. Eccl. Law, 843	743
—— *v.* White	2 Ld. Raym. 1379	744
Reynolds, Ex parte	20 Ch. D. 294	520
———— *v.* Monkton	2 M. & Rob. 384	673, 678
Richards *v.* Cullerne	7 Q. B. D. 623	565
————, In re, Ex parte Official Receiver	1 Morrell's Bankcy. Cas. 242	45
Ricketts *v.* Weaver	12 M. & W. 718	496
Rigby *v.* Connol	14 Ch. D. 482	414
Roberts *v.* Andrews	2 W. Bl. 720	123
———— *v.* Humby	3 M. & W. 120	247
———— *v.* Roberts	13 Q. B. D. 794	116, 117, 119, 311, 570, 572, 574, 575
Robinson *v.* Gosnold	6 Mod. 171	355
———— *v.* Tucker	14 Q. B. D. 371	203
Rodwell *v.* Redge	1 Car. & P. 220	390
Rolfe, Re	28 Sol. J. 165	369
Rook *v.* Hopley	3 Ex. D. 209	772
Roper *v.* Lendon	1 E. & E. 825	173, 176
Rouse & Meier, In re	Law Rep. 6 C. P. 212	179
Rowley *v.* Rowley	Law Rep. 1 H. L., Sc. 63	533
Royal Liver Friendly Society, In re	35 Ch. D. 332	425, 427, 429
Royle *v.* Busby	6 Q. B. D. 171	728
Russell, Ex parte, In re Butterworth	19 Ch. D. 588	45, 47
Rylands *v.* Fletcher	Law Rep. 3 H. L. 330	705

S.

St. David's Case, Bishop of	1 Salk. 106	11, 27
St. Giles's, Reading *v.* Eversley	1 Str. 580	192
St. Nazaire, In re	12 Ch. D. 88	697, 698
St. Pancras (Guardians of) *v.* Guardians of Norwich Incorporation	18 Q. B. D. 521	599
Salford (Guardians of) *v.* Overseers of Manchester	10 Q. B. D. 172	600, 601, 602
Salisbury (Marquis of) *v.* Great Northern Railway Company	5 C. B. (N.S.) 174	268, 273
———————— *v.* Ray	8 C. B. (N.S.) 193	317, 318
Samuel *v.* Hitchmough	13 C. B. (N.S.) 3	298
Saner *v.* Bilton	11 Ch. D. 416	337
Sangster *v.* Kay	5 Ex. 386	780, 781
Sapsford *v.* Fletcher	4 T. R. 511	217
Schmitz, Ex parte. In re Cohen	12 Q. B. D. 509	320, 321, 513
Scott *v.* Avery	5 H. L. C. 811	174
—— *v.* London and St. Katharine Dock Company	3 H. & C. 596	360
Sevenoaks, &c. Railway Company *v.* London, Chatham, and Dover Railway Company	11 Ch. D. 625	795

	PAGE
Sewell *v.* Burdick	10 App. Cas. 74 . . 477
Sheldon *v.* Flatcher	17 L. J. (C.P.) 34 . . 295
Shepherd *v.* Conquest	17 C. B. 427 . 381, 383, 385, 386
Sheppard *v.* Bradford	16 C. B. (N.S.) 369 . 455, 458, 459
Shippey *v.* Grey	49 L. J. (Q.B.D.) 524 695, 696, 698
Shrewsbury and Birmingham Railway Company *v.* North-Western Railway Company	6 H. L. C. 113 . . 390
Simpson *v.* Charing Cross Bank	34 W. R. 568 . . 786
Skinner *v.* City of London Marine Insurance Corporation	14 Q. B. D. 882 . . 578
Small *v.* Marwood	9 B. & C. 300 . . 542
Smalley *v.* Hardinge	7 Q. B. D. 524 . 344, 345
Smith *v.* Capron	7 Hare, 185 . . . 527
—— *v.* Dimes	4 Ex. 32 . . . 161
—— *v.* Dresser	Law Rep. 1 Eq. 651 45, 47, 542
—— *v.* Sherman	4 Cushing (Mass.) 408 495, 505
—— *v.* Sydney	Law Rep. 5 Q. B. 203 . 767
—— *v.* Woodfine	1 C. B. (N.S.) 660 . 505, 506
Snowdon *v.* Dales	6 Sim. 524 . . . 169
Soane *v.* Knight	1 Mood & M. 74 . . 277
Sollers *v.* Lawrence	Willes, 413 . . 497, 503
Souch *v.* Strawbridge	2 C. B. 808 . . . 531
Speller *v.* Bristol Steam Navigation Company	13 Q. B. D. 101 . . 84
Spence *v.* Chodwick	10 Q. B. 517 . . . 826
Stanford, Ex parte. In re Barber	17 Q. B. D. 259 306, 307, 309, 310, 352, 570, 571, 572, 573, 574, 575
Stebbins *v.* Palmer	1 Pickering (Mass.) 71 495, 505
Stourbridge Canal Company *v.* Dudley	30 L. J. (Q. B.) 108 . 397, 404
Stratton *v.* Metropolitan Board of Works	Law Rep. 10 C. P. 76. . 791
Strauss *v.* Francis	Law Rep. 1 Q. B. 379 . 142
——— *v.* ———	4 F. & F. 939 . . 277
Stray, Ex parte. In re Stray	Law Rep. 2 Ch. 374 . . 542
——— *v.* Russell	1 E. & E. 888 . 577, 578, 580, 581, 582, 584, 585
Sulley *v.* Attorney General	5 H. & N. 711 . . 578
Sury *v.* Pigot	Poph. 166 . . . 267
Swinfen *v.* Lord Chelmsford	5 H. & N. 890 . 142, 143
——— *v.* Swinfen	1 C. B. (N.S.) 364 and 27 L. J. (Ch.) 35 . . . 142
Swinford *v.* Byrne	Gow's N. P. 5 . .52, 53

T.

Tappenden *v.* Burgess	4 East, 230 . . . 542
Tarry *v.* Ashton	1 Q. B. D. 314 . . 360
Taylor *v.* Caldwell	3 B. & S. 826. . . 826
—— *v.* Hawkins	16 Q. B. 308 . . . 636
—— *v.* Stray.	2 C. B. (N.S.) 175 . . 578
—— *v.* Zamira	6 Taunt. 524 . . 217
Thackrah *v.* Seymour	1 Cr. & M. 18 . . 799
Thomas *v.* Quartermaine	17 Q. B. D. 414 and 18 Q. B. D. 685 360, 364, 365, 367
——— *v.* Sylvester	Law Rep. 8 Q. B. 368 . 685
Thompson *v.* Farrer	9 Q. B. D. 372 . . 563
——— *v.* Shackell	1 Mood & M. 187 . 277, 278
——— *v.* Thompson	1 Sw. & Tr. 231 . . 78

		PAGE
Tischler *v.* Althorpe	33 W. R. 548	757, 760
Todd *v.* Robinson	14 Q. B. D. 739	201
Tomlinson, Ex parte. Re Boyce	3 De G. F. & J. 745	45
Toogood *v.* Spyring	1 Cr. M. & R. 181	636
Towsey *v.* White	5 B. & C. 125	198
Trumbull *v.* Gibbons	3 City Hall Recorder, 97	637
Turnbull *v.* Bird	2 F. & F. 508	277, 278
——— *v.* Forman	15 Q. B. D. 234	123
Turquand, Ex parte	14 Q. B. D. 405	344, 346, 348
Twycross *v.* Grant	4 C. P. D. 40.	506

U.

Usil *v.* Brearley	3 C. P. D. 206	333

V.

Vallance *v.* Nash	2 H. & N. 712	203
Valpy *v.* Gibson	4 C. B. 837	616
Van Sandau, Ex parte	1 Ph. 445	72, 75
Vaughan, Ex parte. In re Riddeough	14 Q. B. D. 25	45
Veale *v.* Automatic Boiler Feeder Company	18 Q. B. D. 631	766
Virany *v.* Warne	4 Esp. 47	52, 53

W.

Waddell *v.* Blockey	10 Ch. D. 416	333
Waddilove *v.* Barnett	2 Bing. N. C. 538	211, 212
Walker *v.* Hatton	10 M. & W. 249	83
Wallerstein *v.* Herbert	16 L. T. 453	381
Walsh *v.* Lonsdale	21 Ch. D. 9	587, 588
Walter *v.* Gunner	1 Hagg. Cons. 314	672, 677
——— *v.* Maunde	1 J. & W. 181	525
Walton, Ex parte	17 Ch. D. 746	344, 346
Ward *v.* Carttar	Law Rep. 1 Eq. 29	212
——— *v.* Morse	23 Ch. D. 377	337
Wason *v.* Walter	Law Rep. 4 Q. B. 73	278
Waterford and Limerick Railway Company *v.* Kearney	12 Ir. Com. Law, 224	487
Waterpark *v.* Fennell	7 H. L. C. 684	273
Watson, Ex parte	5 Ch. D. 35	616
Watts *v.* Kelson	Law Rep. 6 Ch. 166	229, 231
Wenman *v.* Ash	13 C. B. 836	636
Werderman *v.* Société Générale d'Electricité	19 Ch. D. 246	157, 159
Westoby *v.* Day	2 E. & B. 605	329
Wheatley *v.* Lane	1 Wms. Saund. 240	496, 502, 504
Wheeldon *v.* Burrows	12 Ch. D. 31	267
Whinney, Ex parte	17 Q. B. D. 238	261
———, In re Sanders	13 Q. B. D. 476	320, 513
Whitehouse *v.* Wolverhampton Railway Company	Law Rep. 5 Ex. 6	704, 708, 713
Wiggett *v.* Fox	11 Ex. 832	360, 366
Wight *v.* Shaw	19 Q. B. D. 396	337
Wilbraham *v.* Livesey	18 Beav. 206	526

		PAGE
Wilkinson *v.* Lloyd	7 Q. B. 27	577, 580, 584
Williams *v.* Eyton	2 H. & N. 771	790
——— *v.* Williams	37 L. J. (Eq.) 854	565
Wilson *v.* Wilson	1 H. L. C. 538	533
——— *v.* Whitaker	Moo. & M. 8	327
Wilton, Ex parte	1 Dowl. (N.S.) 805	70, 73, 75
——— *v.* Dunn	17 Q. B. 294	212, 216
Wolfe *v.* Matthews	21 Ch. D. 194	414
Wood *v.* Mayor of London	1 Salk. 397	60
Woodley *v.* Metropolitan District Railway Company	2 Ex. D. 384	360, 365
Woollett *v.* Davis	4 C. B. 115	295
Woolstanton and Burslem Union *v.* Northwich Union	46 L. T. (N.S.) 528	599
Wreck Recovery and Salvage Company, In re	15 Ch. D. 353	388
Writers to the Signet, The Society of *v.* Commissioners of Inland Revenue	14 Rett. 34	628, 632

Y.

Yarmouth *v.* France	19 Q. B. D. 647	360, 361, 364
Yeo *v.* Dawe	53 L. T. Rep. (N.S.) 125	647, 650
York, Archbishop of *v.* ———	1 Vern. 119	7

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

LI. VICTORIÆ.

[IN THE COURT OF APPEAL.]

1887
Nov. 17, 18, 19, 21.

EX PARTE REV. JAMES BELL COX.

Ecclesiastical Law—Disobedience of Order of Suspension—Period of Suspension, issue of writ de contumace capiendo after—53 Geo. 3, c. 127, ss. 1, 2, 3—5 Eliz. c. 23, s. 10—Contumacy—Satisfaction—Old Practice on Excommunication—Habeas Corpus—Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 19.

The power to issue a writ de contumace capiendo under 53 Geo. 3, c. 127, for disobedience of an order of the Ecclesiastical Court is not confined to cases where obedience to the order remains possible.

A clerk in orders having disobeyed a monition issued in a suit instituted against him in the Ecclesiastical Court under the Church Discipline Act, 1840, a suspension was published and served upon him whereby he was suspended from his clerical office for a period of six months. During such period he officiated in his church, notwithstanding the suspension, and a significavit in respect of such disobedience issued against him. After the expiration of the six months, a writ de contumace capiendo was issued against him under 53 Geo. 3, c. 127, s. 1, upon which he was arrested:—

Held, reversing the decision of the Queen's Bench Division, that the writ was lawfully issued.

The 19th section of the Judicature Act, 1873, gives an appeal from orders made by the High Court of Justice on application for habeas corpus whether the order grants or refuses the writ.

APPEAL from the order of the Queen's Bench Division (Lord

1887

EX PARTE REV. JAMES BELL COX.

Coleridge, C.J., and A. L. Smith, J.), making absolute a rule for a habeas corpus. (1)

The facts which are fully set out in the report of the case in the Court below were briefly as follows.

A suit had been instituted against the Rev. Mr. Bell Cox, vicar of St. Margaret's, Toxteth Park, Liverpool, under the Church Discipline Act, 1840, for offences against the ritual of the church, the result of which was that a monition issued directing him to refrain from certain illegal practices complained of in the suit. This monition he disobeyed, and in consequence on June 13, 1886, a suspension was published and served upon him whereby he was suspended from his clerical office for a period of six calendar months. Notwithstanding the suspension he officiated in his church on June 20, 1886. A significavit issued in respect of such disobedience on August 5, 1886. Proceedings for a prohibition being taken on the part of Mr. Bell Cox, nothing was done upon the significavit while those proceedings were pending; but on May 2, 1887, a writ de contumace capiendo was issued under 53 Geo. 3, c. 127, s. 1, against Mr. Cox, and he was on May 4 arrested under such writ. Application was thereupon made to the Queen's Bench Division for a writ of habeas corpus, and upon the argument of the rule it was made absolute, and Mr. Cox was discharged from custody. From this decision the promoter of the suit appealed.

Sir Walter Phillimore, for the respondent, the Rev. Mr. Bell Cox, took the preliminary objection that no appeal lay. There is no appeal against an order granting a habeas corpus and discharging the prisoner. It is true that the words of s. 19 of the Judicature Act, 1873, give in general terms an appeal against all judgments or orders, except as thereinafter mentioned, and that habeas corpus is not specifically excepted, but it is contended that such general words may be limited by reference to the well-established constitutional doctrines and the previous practice as to habeas corpus. To construe the Act as giving an appeal in cases of habeas corpus where the prisoner succeeds below and is discharged would be unfavourable to the liberty of the subject.

(1) 19 Q. B. D. 307.

It was the well-established practice that, if the application on the prisoner's behalf failed before one judge, there was a right to go before another, and so on through all the Courts, and, if the prisoner could get from any of them a habeas corpus, there was no appeal. If there is an appeal, it would seem that the prisoner must be deprived of that privilege. If there is an appeal from the order discharging the prisoner, and that order is reversed, what is to happen? Can the prisoner be re-arrested? If so, could he go again to any of the judges below to obtain a habeas corpus? If he could not, the subject is deprived of a safeguard of liberty. It is contended that, the prisoner having once been discharged, there is no power to re-arrest him upon the reversal of the order of the Court below, and the Court of Appeal will not entertain the theoretical question whether he ought to have been so discharged. How can this Court discharge an order that has been already performed and is therefore exhausted? Secondly, if there could be a right of appeal, who in this case would have such right? Notice of the rule for the habeas corpus had to be given and was given to the appellant as a party interested, he being the promoter of the suit; but the appellant is no party in the proper sense to the proceedings for a habeas corpus, and therefore has no right of appeal.

[The Court intimated that they would hear the appeal argued.]

Jeune and *Danckwerts*, for the appellant. The main point taken on behalf of the respondent was that, after the term of suspension was over, there was no order of the Court to enforce, and that he could not be imprisoned by way of punishment for his disobedience to an order which was no longer in existence; that the power of imprisonment was intended only to enforce obedience to an existing order. The question turns upon the construction of the Act 53 Geo. III., c. 127. (1)

(1.) The preamble of the Act is:—"Whereas it is expedient that excommunication, together with all proceedings following thereupon, should, saving in certain cases, be discontinued, and that other proceedings should be substituted in lieu thereof; and that certain other regulations should be made in the proceedings of the Ecclesiastical Courts; and that more convenient modes of recovering tithes and church-rates in certain cases should be provided."

Sect. 1 provides that, "From and

1887

EX PARTE REV. JAMES BELL COX.

The words "until he shall have made satisfaction for the said contempt" in the writ de contumace capiendo apply to all the

after the passing of this Act, excommunication, together with all proceedings following thereupon, shall in all cases, save those hereafter to be specified, be discontinued . . . and in all causes which according to the laws of this realm are cognizable in the ecclesiastical Courts, when any person or persons having been duly cited to appear in any Ecclesiastical Court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such Court, no sentence of excommunication shall be given or pronounced,—saving in the particular cases hereafter to be specified; but instead thereof, it shall be lawful for the judges or judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the Court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same in the form to this Act annexed, to his Majesty in Chancery, as hath heretofore been done in signifying excommunications, and thereupon a writ de contumace capiendo, in the form to this Act annexed, shall issue from the Court of Chancery . . . and the same shall be returnable in like manner as the writ de excommunicato capiendo hath been by law returnable heretofore, and shall have the same force and effect as the said writ; and all rules and regulations not hereby altered, now by law applying to the said writ, and the proceedings following thereupon, and particularly the several provisions contained in a certain Act passed in the fifth year of Queen Elizabeth, intituled 'An Act for the due execution of the writ de excommunicato capiendo,' shall extend and be applied to the writ de contumace capiendo and the proceedings following thereupon, as if the same were herein particularly repeated and enacted; . . . and upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the Court, the judges or judge of such Ecclesiastical Court shall pronounce such party absolved from the contumacy and contempt aforesaid, and shall forthwith make an order in the form to this Act annexed, for discharging such party out of custody."

Sect. 2 provides: "Provided always . . . . that nothing in this Act contained shall prevent any ecclesiastical Court from pronouncing or declaring persons to be excommunicate in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, such sentences or decrees being pronounced as spiritual censures for offences of ecclesiastical cognizance, in the same manner as such Court might lawfully have pronounced or declared the same, had this Act not been passed."

Sect. 3. "And be it further enacted, that no person who shall be so pronounced or declared excommunicate, shall incur any civil penalty or incapacity whatever in consequence of such excommunication, save such imprisonment, not exceeding six months, as the Court pronouncing or declaring such

cases of contumacy or contempt mentioned in s. 1, and they mean that appropriate satisfaction must be made in each case, not always the same satisfaction, but in each case satisfaction corresponding to the nature of the contempt. The argument for the respondent amounts to this, that the three modes of obtaining absolution and an order of discharge mentioned in 53 Geo. 3, c. 127, s. 1, are the only modes, and that, as in such a case as the present the order of suspension could not be obeyed after the

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person excommunicate shall direct, and in such case the said excommunication, and the term of such imprisonment, shall be signified or certified to his Majesty in Chancery, in the same manner as excommunications have been heretofore signified, and thereupon the writ de excommunicato capiendo shall issue, and the usual proceedings shall be had, and the party being taken into custody shall remain therein for the term so directed, or until he shall be absolved by such ecclesiastical Court."

Schedule (A). Significavit of party being contumacious and in contempt . . . . "We hereby notify and signify unto your Majesty, that one [. . . .] hath been duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical, in not [as the case may be] appearing before [here set out the style of the ecclesiastical judge, or his representative], or in not obeying the lawful commands [here set out the commands] of [such judge or representative], or in having committed a contempt in the face of the Court of [such judge or representative] lawfully authorized by [here set out the nature and manner of such contempt], on a day and hour now long past, in a certain cause of . . ."

Sched. (B). Writ de contumace capiendo . . . . "is manifestly contumacious, and contemns the jurisdiction and authority of [here fully state the non-appearance, disobedience, together with the commands disobeyed, or the contempt in the face of the Court, as the case may be] nor will he submit to the ecclesiastical jurisdiction . . . . We command you that you attach the said [. . . .] by his body, *until he shall have made satisfaction for the said contempt* . . . ."

Sched. (C). Writ of deliverance . . . "for contumacy [. . . .] attached by his body until he should have made satisfaction for the contempt; now he having submitted himself, and satisfied the said contempt, we hereby empower and command you," &c.

The Act 5 Eliz. c. 23, s. 10, reserved "to all archbishops and bishops, and all others having authority to certify any person excommunicated, like authority to accept and receive the submission and satisfaction of the said person so excommunicated, in manner and form heretofore used, and him to absolve and release, and the same to signify, as heretofore hath been accustomed, to the Queen's Majesty, her heirs and successors, into the High Court of Chancery, and thereupon to have such writs for the deliverance of the said person, so absolved and released, from the sheriff's custody or prison, as heretofore they or any of them had, or of right ought to or might have had" . . . . [In the Revised Ed. of the Statutes, vol. i., p. 616, this section is numbered 5.

1887

EX PARTE REV. JAMES BELL COX.

period of suspension had expired, if the party could be committed to prison after the expiration of that period, he would never be able to get out again, because it would be impossible for him then to obey the order. The answer is this, that, although the Act points out three modes in which the party who follows them can obtain absolution and consequent release from prison, those are not the only modes known to the law by which he can do so. Those modes are from their nature inapplicable to a large number of cases. The Act in certain cases substitutes new modes of obtaining absolution and release for the modes which previously existed. In cases to which the new modes do not apply the old procedure is preserved. The Act 5 Eliz. c. 23, is really incorporated with the Act of George III., and remains in force so far as it is not inconsistent with it. A man who has once disobeyed a continuing order of the Court cannot say that he has not disobeyed it, even if he obeys it afterwards; the only way in which he can obey it then is by promising to obey for the future. The statute of Elizabeth shews that there was then a mode of obtaining absolution and release, and that mode remains in force in cases to which the Act of George III. does not apply. If a man was ordered to do, or not to do, a particular thing on a specified day which has gone by, or if he was suspended from the exercise of his office for a month, and he has disobeyed the order, is the Court powerless to punish for contempt? Sect. 1 of the Act of George III. in plain words gives the Court power to signify the contempt of a person "who shall neglect or refuse to pay obedience to the lawful orders or decrees" of the Court, and thereupon "a writ de contumace capiendo shall issue." Those plain words cannot be cut down and limited to cases for which special modes of obtaining absolution and release are afterwards provided. The Act of Elizabeth provides a general mode of obtaining absolution and release by submission and satisfaction. That mode is supplemented, not superseded, by the special provisions of the Act of George III. If the argument for the respondent is well founded a man who had once disobeyed a perpetual monition to do or not to do specified acts could never, after he had been committed to prison for his disobedience, obtain his release, for he could never obey the order as regarded the particular act for which he

had been committed. The object of the imprisonment is to punish a past act of disobedience. Every violation of a monition, however long the period to which it extends, is a specific act of disobedience, and that distinct act of disobedience can be "signified." If the party discontinues his disobedience, he has none the less disobeyed the order. Though the Act of George III. is a general one, the preamble shews that it was passed with a special view to the case of persons who refused to appear before the Ecclesiastical Courts, and who would not pay tithes or church rates, and the special modes provided for obtaining absolution and release are directed to such cases.

The nature of the practice referred to in s. 10 of the Act 5 Eliz. c. 23 appears in Phillimore's Ecclesiastical Law, vol. 2, p. 1414; Fitzherbert De Naturâ Brevium, vol. 2, pp. 62, 63; *Archbishop of York* v. ————. (1) The contumacious person had to take an oath of obedience to the decrees of the Church generally; he then ceased to be a contumacious person. It is not contended that he was required to do anything more than that which is mentioned in the statute, though Dr. Lushington, in *Baker* v. *Thorogood* (2), expressed an opinion that he would be. The object of the imprisonment was not merely to enforce the doing of a particular thing, but to enforce respect to the orders of the Court generally, and a person who once disobeys an order becomes a contumacious person. In *Martin* v. *Mackonochie* (3) it was held that a perpetual monition could be enforced by suspension as well as by significavit; but if the judgment of the Divisional Court is right, it could not be enforced in either way.

The cases referred to in the judgment of the Divisional Court are all distinguishable from the present. In *Reg.* v. *Thorogood* (4), one of the objections taken to the writ de contumace capiendo was, that it did not contain the "addition" of the party, and the Court held that this omission was no ground for discharging him from an imprisonment for contempt, such an imprisonment not being within the words "pains and forfeitures" in s. 13 of the statute of Elizabeth. The words in that case relied on by the other side are only an obiter dictum, for the objection was not that the

(1) 1 Vern. 119.
(2) 2 Curt. Eccl. Rep. 632.
(3) 4 Q. B. D. 697.
(4) 12 A. & E. 183.

1887

EX PARTE REV. JAMES BELL COX.

writ was vitiated, but that the penalties were made void. In *Hudson* v. *Tooth* (1) an application for the release of the contumacious person, under the provisions of the Act 3 & 4 Vict. c. 93, was made by the complainant, and therefore there was no necessity for the Court to decide any point. The writ would have been bad ab initio, if the defendant could never have been released. That was not suggested.

In *Dean* v. *Green* (2) the defendant had been inhibited under the Public Worship Regulation Act for a term of three months from performing the services of his church. He had disobeyed the inhibition. The three months had expired, as had also the period of three years, after which, by virtue of the Public Worship Regulation Act, 1874, the defendant had ceased to be rector of the parish. He did not choose to apply for his release, and the complainant declined to do anything. The bishop applied for the release of the defendant and the complainant did not oppose. If the argument for the respondent is right, Mr. Green could have applied for a writ of habeas corpus. He would have been entitled to his release at once, because the period of the inhibition had come to an end, and there would have been no need for Lord Penzance to deal with any other point. He said there had been complete obedience on the part of the defendant, because by his imprisonment he had been compelled to obey the order of the Court, and the term of the inhibition had come to an end. That case is really an authority in favour of the appellant.

In *Baker* v. *Thorogood* (3) the question was what costs must be paid by the defendant before he could be released. He had not appeared, and therefore none of the modes of relief provided by the Act of George III. applied. That case shews that under that Act a person who had not appeared could obtain his release from prison in one way, and in one way only, viz., by submitting himself and taking the oath of obedience, i.e., under the provisions of s. 10 of the Act of Elizabeth. That case does not conflict with *Hudson* v. *Tooth*. (1) In *In re Baines* (4) the question was whether the significavit could lawfully issue in the name of the Dean of

(1) 2 P. D. 125.
(2) 8 P. D. 79.
(3) 2 Curt. Eccl. Rep. 632.
(4) 1 Cr. & Ph. 31.

the Arches, or whether it must be in the name of the archbishop himself. The schedules to the Act of George III. are not inconsistent with the Act itself, if the Act of Elizabeth is incorporated with it.

It would be too narrow a construction to say that imprisonment for contempt is intended only to enforce obedience to a particular order; it is also to enforce respect for the general jurisdiction of the Court. It is partly intended to punish a particular act of disobedience; partly to enforce general obedience: *Ex parte Kaye* (1); *Rex* v. *Rodman* (2). *Hoile* v. *Scales* (3), which was cited in the Divisional Court, related to proceedings under ss. 2 and 3, of the Act of Geo. 3, and those sections do not apply to the same cases as s. 1.

[LORD ESHER, M.R. If we should come to the conclusion that the appellant is right, what are we to do?]

This Court would only have to discharge the rule which was made absolute below. There will then be nothing to prevent the promoters from applying for another significavit in respect of a different act of disobedience. And, if the writ has not yet been returned, the respondent could be re-committed under it. There exists a writ for the purpose of retaking an excommunicated person who has been wrongly discharged.

Sir Walter Phillimore, and *Beaufort*, for the respondent. The imprisonment in this case was under 53 Geo. 3, c. 127, s. 1. It is contended that the procedure given by that section is only applicable where it is sought to enforce obedience to an order in the future, and therefore cannot have any operation where the order disobeyed is at an end. The Act of George III. altogether altered the old practice in the cases to which it applied. Before that Act, for instance, a person imprisoned for non-appearance could not obtain his discharge by merely appearing. He was excommunicated, and must obtain absolution, and so get the excommunication set aside, before he could be discharged. The Act of George III. was intended to abolish excommunication, and to provide a summary mode of enforcing obedience or submission, in certain cases only. In cases of disobedience or

(1) 1 B. & Ad. 652. (2) Cro. Car. 198.
(3) 2 Hag. Eccl. Rep. 566.

1887

Ex parte Rev. James Bell Cox.

other contumacy to which the procedure given by 53 Geo. 3, c. 127, s. 1, is not applicable, the provisions of the 2nd and 3rd sections apply. These sections preserve the old power of proceeding by excommunication where the object is punishment for contempt; and such sentence of excommunication may be by decree in the same suit in which the contempt was committed. There may be an interlocutory decree having the force of a definitive sentence for contempt in the same suit. The 1st section is merely intended to give a process for compelling obedience summarily in cases where obedience is possible, instead of the old procedure by excommunication. The new procedure by pronouncing the party contumacious and writ de contumace capiendo applies to three cases, viz., those of non-appearance, disobedience to an order or decree of the Court, and contempt in the face of the Court; in each case it is contemplated by the section that the party may by mere obedience or submission in respect of the particular thing in which he has made default without more obtain his release: if he has not appeared, by appearance; if he has disobeyed an order, by obeying it; if he has been guilty of a contempt in the face of the Court, by submitting to the Court. The imprisonment under the 1st section is not to be by way of punishment for past disobedience, or to compel a general promise of obedience in future, but to compel obedience in the future in respect of a particular thing. Proceedings by way of punishment for past disobedience may be had under the 2nd and 3rd sections, but not the 1st. If it were not so, a man imprisoned under the writ de contumace capiendo for non-obedience to an order which he can no longer obey could never get his release. To say that obedience may be given to an order by promising obedience in future to the Court is to put an unnatural meaning on the words. There is no mode of getting released in the case of proceedings under 53 Geo. 3, c. 127, s. 1, except the modes pointed out in the 1st section. The provisions of the Act of 5th Elizabeth are to apply to the writ de contumace capiendo so far as is consistent with the Act of George III. The general scope of the Act of Elizabeth was to provide for the due execution of writs de excommunicato capiendo by making them returnable in the King's Bench. It is contended that s. 10 of the Act, upon which reliance

is placed by the other side, as providing for a mode of procuring release applicable to the new process de contumace capiendo, only applies to the period prior to the return of the writ de excommunicato capiendo. After the return of the writ into the King's Bench the custody in which the prisoner remained was no longer that of the sheriff but of the Common Law Court, and was subject to their orders, whereas the 10th section only relates to release from the custody of the sheriff.

[BOWEN, L.J. What authority is there for saying that after the return of the writ the custody ceased to be that of the sheriff? The *Bishop of St. David's Case* (1) seems to shew that habeas corpus was the only remedy after the return of the writ. That would not be so if the prisoner was in the custody of the Court itself.]

The 10th section may have been inserted by way of a proviso to the 8th section, ex majori cautelâ, the idea being that, where a person excommunicated was in the custody of the sheriff under a capias issued out of the King's Bench, there might be a difficulty about the sheriff's releasing him on his obtaining absolution by making submission and satisfaction in the Ecclesiastical Court, inasmuch as the sheriff would then be acting under the process of the Common Law Court, not of the Ecclesiastical Court; or it may have been thought that the sheriff, being bound under the Act to return the writ de excommunicato capiendo to the King's Bench, there might be a difficulty about releasing the prisoner merely upon his making submission to the ecclesiastical authority and obtaining absolution, unless some provision were made with regard to the matter. The expression "absolve" as used in s. 10 is not applicable to the contumacious person under the Act of George III., but only to a person excommunicated. The authorities are strong to shew that the proceedings under the 1st section of 53 Geo. 3, c. 127, are to compel obedience in future, and not by way of punishment for past disobedience: *Reg.* v. *Thorogood* (2); *Hudson* v. *Tooth* (3); *Dean* v. *Green* (4); *Dale's Case* (5); *Green* v. *Lord Penzance.* (6) The

(1) 1 Salk. 106, 294.
(2) 1 A. & E. 183, at p. 196.
(3) 2 P. D. 125, at p. 139.
(4) 8 P. D. 79.
(5) 6 Q. B. D. 376, at pp. 459, 460
(6) 6 App. Cas. 657, at p. 683.

1887

EX PARTE REV. JAMES BELL COX.

dicta of Dr. Lushington in *Baker* v. *Thorogood* (1), which are relied on for the appellant, were not necessary for the decision of the case, and he does not seem, when dealing with that case, to have had the provisions of the Act of George III. before his mind.

Jeune, in reply. It is immaterial whether the power to make satisfaction and obtain release otherwise than according to the Act of George III. exists under the 10th section of the Statute of Elizabeth or under the old practice before that statute. It appears doubtful whether that section was really necessary; it was probably only inserted ex majori cautelâ. The Act of George III. applies the old practice so far as applicable to the new process de contumace capiendo, and enables the party to get absolved from his contumacy and released, as under the old practice he got absolved from the excommunication and released. "Contumacy" is not the creature of statute; it is only the ecclesiastical synonym for "contempt." The object of abolishing the process by excommunication in cases of non-appearance, disobedience to an order, or contempt, was to avoid the delays resulting from the procedure on excommunication. It is argued on the other side that contumacy might be punished under s. 2 of 53 Geo. 3, c. 127. If that be so, it could only be by definitive sentence or decree pronounced in an independent suit with all its delays. There could not be a definitive sentence or decree in the nature of a definitive sentence of excommunication for contempt in the same suit, because a definitive sentence or decree could only be on the articles alleged in the suit. There cannot be two definitive sentences in one suit.

LORD ESHER, M.R. In this case a monition was issued against Mr. Cox, directing him to refrain from certain illegal practices. This he disobeyed, and the result was a decree of suspension for six calendar months from June 13, 1886. He thought it his duty to disobey, and accordingly he did disobey the decree of suspension, and thereupon there was a signification of such disobedience to the High Court as representing the old Court of Chancery. Mr. Cox then moved for a prohibition. Some time

(1) 2 Curt. Eccl. Rep. 632.

1887

Ex parte Rev. James Bell Cox.

Lord Esher, M.R.

was taken up by the proceedings for a prohibition, but ultimately the rule for a prohibition was discharged in April, 1887. On May 2 a writ de contumace capiendo was issued out of the Chancery of Lancaster, and on May 4 Mr. Cox was arrested under such writ. Thereupon an application was made for a habeas corpus in the Queen's Bench Division, and, under the new procedure in relation to habeas corpus, upon the argument of the rule nisi for the habeas corpus, the Queen's Bench Division made the rule absolute, and directed the release of Mr. Cox. From that decision there has been an appeal to this Court, and the first point taken on behalf of Mr. Cox is that no appeal lies. It was argued that, if such an appeal lies, a prisoner would be deprived of the privilege which he had under the old practice of applying, where his application for a habeas corpus was refused by one judge, to all the other judges in succession. It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the Courts in succession. What was in substance the effect? The subsequent application to another Court was really an appeal, for it might be made on precisely the same materials as the previous one. These applications for writs of habeas corpus often raised very important questions of law with regard to the liberty of the subject, and the inconvenient result followed from the old practice that different Courts might express different opinions on such questions. One would naturally expect that, when the Judicature Act was passed, which did away with separate Courts, some provision would be made for an appeal in proceedings for writs of habeas corpus, in order to preserve to a prisoner his right of not being kept in prison upon the decision of one Court alone; or, on the hypothesis that the Courts were for this purpose not to be treated as one, in order to prevent the inconvenience that previously existed, where Courts of co-ordinate jurisdiction pronounced different opinions on the same point. But after all the question must depend on the words of the Judicature Act. The Act provides that there shall be an appeal from any judgment or order of the High Court save as thereinafter mentioned. The inevitable construction of that provision is that all cases not within the exception must fall within the general words of the enact-

1887

EX PARTE REV. JAMES BELL COX.

Lord Esher, M.R.

ment. It is admitted by the counsel for Mr. Cox that a prisoner whose release had been refused would have a right of appeal; but it is suggested that the person objecting to his release has no right of appeal. But how could the prisoner get the right of appeal except under the words of the Judicature Act? So that the contention must be, that the words which are admitted to give an appeal in one case do not give it in the other. The contention is, in my opinion, an altogether impossible one. Another point is that, assuming there might be an appeal, the appellant here is not a party entitled to appeal. He is a person who was treated in the Ecclesiastical Court as aggrieved by the illegal acts of Mr. Cox. He was a party to the suit, and was entitled to be heard, and was heard by counsel in the Court below; and yet it is said that he is not the proper party to appeal. It seems to me that this point is equally untenable with the other. I have no doubt that there is a right of appeal on both sides in cases of habeas corpus.

That being so, we have to consider the ground upon which this appeal is brought. The suggestion made is that the writ de contumace capiendo was issued without jurisdiction, because it was issued at a time when the operation of the suspension must be considered as exhausted. It was argued that, that being so, upon the true construction of the Statute of George III., the writ could not legally be issued. I agree with the statement of the judges below that "the question is whether, after the order of suspension ab officio for six months had expired, as it did on December 13, 1886, the writ de contumace capiendo could be lawfully issued," and that "this depends on the true construction of 53 Geo. 3, c. 127." The question before us on appeal is whether we agree with the construction put on that Act by the Divisional Court. It seems to me to be an ordinary question of the construction of a statute, which must be dealt with according to the usual rule of construction, viz., that the words used must be construed according to their ordinary signification, unless there is something rendering it necessary to construe them otherwise. I decline to be led a step further than I am absolutely obliged into the intricacies and disputable points of ecclesiastical law and procedure which have been discussed during the argument. To follow up

all the by-paths into which we have been led, to my mind would only tend to bewilderment. The case appears to me to depend on the construction of the words of this Act of George III., and what we have to consider is the question, what are the consequences of Mr. Cox's disobedience under that Act? The Act recites that it is expedient that excommunication and the proceedings thereupon should be discontinued, save in certain cases, and that other proceedings should be substituted in lieu thereof. It was suggested to us by the counsel for the appellant that the reason for passing this enactment was that under the process of excommunication the proceedings were very dilatory. I dare say that was one of the reasons; but I cannot help thinking that at the time when that Act passed the legislature may very probably have been willing to get rid in these cases as far as possible of the doctrine of excommunication, with all its spiritual and ecclesiastical consequences, as inconsistent with modern ideas of procedure. The 1st section of the Act provides "that from and after the passing of the Act, excommunication, together with all proceedings following thereupon, shall in all cases, save those hereafter to be specified, be discontinued." I cannot find that any cases are very clearly specified afterwards, and I do not know to what the words, "save those hereafter to be specified," can refer, except to the provisions in the 2nd section. If so, the provision is that, save in respect of cases within the 2nd section, excommunication is abolished. The section goes on: "And that in all causes which, according to the law of this realm, are cognizable in the Ecclesiastical Courts, when any person or persons, having been duly cited to appear in any Ecclesiastical Court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such Court, no sentence of excommunication shall be given or pronounced, save in the particular cases hereafter to be specified." There are, therefore, three separate cases in which under the Act no sentence of excommunication is to be pronounced, save in the particular cases thereafter to be specified. On these words it might be a ques-

1887

Ex parte Rev. James Bell Cox.

Lord Esher, M.R.

tion whether, even in those cases within s. 1, there might not be proceedings for excommunication under the 2nd section; but it is not really necessary to deal with that question. The section proceeds: "But instead thereof it shall be lawful for the judges or judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the Court shall have been committed, to pronounce such person or persons contumacious and in contempt." The effect seems to be to substitute the process of pronouncing the person contumacious in such cases for the former sentence of excommunication. The one step is put in the place of the other. Then within ten days the same is to be signified to his Majesty in Chancery, as had theretofore been done in signifying excommunications; and "thereupon a writ de contumace capiendo in the form to this Act annexed shall issue from the Court of Chancery, and the same shall be returnable in like manner as the writ de excommunicato capiendo hath been by law returnable heretofore, and shall have the same force and effect as the said writ." The one writ is put in the place of the other. And then the section provides that "all the rules and regulations not hereby altered now by law applying to the said writ and the proceedings following thereupon, and particularly the several provisions contained in a certain Act passed in the fifth year of Queen Elizabeth, intituled, &c., shall extend and be applied to the said writ de contumace capiendo, and the proceedings following thereupon as if the same were herein particularly repeated and enacted." Nothing can be plainer than that the one writ is to be substituted for the other, and that what is to be done upon the new writ is the same as what used to be done on the old writ, except so far as there is anything in the statute to the contrary. The new writ is put in the place of the old one with the same consequences and proceedings to be taken upon it. The provisions of the Act of Elizabeth are to be treated as if they were repeated in the Act. The effect of such a reference to a former Act is that there is a complete writing into the later Act of all those enactments in the former Act which are applicable. It is of course a necessary implication that it is not intended to incorporate anything that is not in the nature of things applicable. The section then, after providing for the

1887

EX PARTE REV. JAMES BELL COX.

Lord Esher, M.R.

issue of the writ by the officers of the Court of Chancery and its execution by the sheriffs and other executive officers, proceeds to provide as follows: "And upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the Court, the judges or judge of the Ecclesiastical Court shall pronounce such party absolved from the contumacy and contempt aforesaid." The meaning of these words, taking them in their ordinary sense, seems to be this: By the former part of the section the declaration of contumacy and the writ de contumace capiendo have been substituted respectively for the sentence of excommunication and the writ de excommunicato capiendo; the person so declared contumacious will, if he cannot bring himself within one of the three cases contemplated by the latter part of the section, remain subject to the procedure in respect of contumacy, which is by the terms of the Act to be the same, except so far as altered by the Act, as the old procedure upon the sentence of excommunication; but, if he comes within any of the three cases provided for by the latter part of the section, then he is to be absolved from the contumacy and the effects of it; and the Court is forthwith to make an order upon the sheriff, or other officer in whose custody he is, for his release. It is to be observed that it is only on that order of the Court being shewn to the sheriff or other person in whose custody such party is, that he is entitled to discharge the prisoner, and that, only, so soon as he shall have discharged the costs lawfully incurred by reason of such custody and contempt. The general effect of the section read according to the ordinary meaning of the words is that in certain cases, in which under the former practice a person would have been subject to excommunication, that process is done away with, and he is instead to be pronounced contumacious, and thereupon the same consequences follow as upon the old practice of excommunication, unless the person comes within one of the three cases mentioned in the latter part of the section, in which case he is to be absolved from the contumacy and to be discharged on payment of the costs. In this case Mr. Cox has not done any of the three things mentioned,

1887

EX PARTE REV. JAMES BELL COX.

Lord Esher, M.R

and therefore is not within the latter part of the section. He is therefore left subject to the operation of the earlier part of it, that is to say he is liable to the same consequences which under the old practice would have happened to him if he had done what he did do and had been excommunicated and taken under the writ de excommunicato capiendo.

What are such consequences? The section refers us to the provisions of the Act of Elizabeth. What is the effect of those provisions? They are provisions not dealing with the Ecclesiastical Courts, but with the executive powers of the Common Law Courts and the sheriffs who had to carry into effect the decisions of the Ecclesiastical Courts. It begins with the preamble: "Forasmuch as divers persons in many great crimes and offences appertaining merely to the jurisdiction and determination of the Ecclesiastical Courts and judges of this realm are many times unpunished for lack and want of the good and due execution of the writ de excommunicato capiendo." I incline to think myself that, even if the 10th section had not been in the Act, it would not have affected the procedure in the Ecclesiastical Courts therein referred to, and that the section was only inserted by way of greater caution. The words of the section are "saving and reserving to all archbishops and bishops, and all others having authority to certify any person excommunicated, like authority to accept and receive the submission and satisfaction of the person so excommunicated in manner and form heretofore used, and him to absolve and release," &c. The provision must be applied to the proceedings under the Act of George III., being incorporated by the express terms of that Act, but the submission to be received under that Act must be of the person declared contumacious and no longer of the person excommunicated. But by the 10th section of the Statute of Elizabeth the proceedings thereby saved are to be "in manner and form heretofore used," so that we are driven to a certain extent to consider the practice of the Ecclesiastical Courts. One of the great uses of the case of *Baker* v. *Thorogood* (1) is, that there was in that case a statement by Dr. Lushington of the practice of the Ecclesiastical Courts in this matter, and that not a statement made merely

(1) 2 Curt. Eccl. Rep. 632.

1887

Ex parte Rev. James Bell Cox.

Lord Esher, M.R.

by the way, but after a deliberate and careful examination. He there says: "If no such statute had passed (referring to the Act of 3 & 4 Vict.) the course of proceeding would have been this: the Court would have been called upon at the instance of the party imprisoned for contempt to allow his contempt to be purged, and that could only be done on payment of the costs incurred in this Court in consequence of his contempt and on his taking the usual oath to submit to the lawful commands of his Ordinary." It was suggested in argument that that statement may be disregarded as really not necessary to the decision of the case. I do not think that the authority of so great a judge is to be thus treated. I do not think that a judge would wish any statement which he may have made in the course of a case, merely obiter and casually, to be treated as necessarily being an authority on the subject in question; but when a judge has thought it necessary for the purpose of a case to make a deliberate examination of the practice of his Court, and to state such practice, I do not think the authority of such statement can be got rid of merely by arguing that it was not really necessary for the actual decision of the case. I think that such a statement if cited as an authority is entitled to great weight, though of course not binding on us as a decision. If that statement of the practice of the Ecclesiastical Court is correct, then that is the practice which by the terms of the Act of Elizabeth and those of the Act of George III. is applicable to the matter. It seems to me that where there has been a declaration of contumacy followed by a writ de contumace capiendo, the case must be treated exactly in the same way afterwards as it would have been under the Statute of Elizabeth, that is according to the old practice of the Ecclesiastical Court before that statute, except in cases where the contumacious person has done one of the three things mentioned in the latter part of the 1st section. It is urged that such person could not under certain circumstances do any of those things. In the case of non-appearance it was said that he could not appear after the suit was at an end. So, also, where a person has disobeyed an order, in some cases he can never obey it afterwards. Very well: the consequence, if he cannot bring himself within the latter part of the section, is that he is left within the operation of

1887

Ex parte Rev. James Bell Cox.

Lord Esher, M.R.

the earlier portion. I do not see that we are called on to consider what may be the subsequent result of our decision with regard to the proceedings in the Ecclesiastical Court. It is not for us to say, as it seems to me, what the judge of the Ecclesiastical Court may consider to amount to obedience for the purposes of such proceedings. All that we have to decide is whether the Queen's Bench Division were correct in saying that Mr. Cox was entitled to be discharged from prison as a matter of right, and without any question as to what the judge of the Ecclesiastical Court might consider obedience or the reverse. The question in my opinion turns entirely on the Act of George III. I have gone through the provisions of the 1st section and expressed my view as to its meaning. The learned judges below seem to have considered that it was not to be construed in the ordinary sense of the words, because the aim and object of the section must be taken to be to compel obedience in the future, not to punish for past acts of disobedience which are irretrievable. This view at once suggests a question as to the meaning of the learned judges below. To say that it is a general rule of English law that punishment is to compel obedience in the future, no doubt, as a general proposition, is in a certain sense true. No punishment is inflicted by the law merely by way of revenge for past acts which cannot be undone. The general object of all criminal or punitive law is not merely to punish what has been done and cannot be undone, but to compel obedience in future, not merely by the person punished, but by others, which really means that it exists to compel obedience in the sense of inducing people not to do similar acts in future. But such a consideration is only applicable to this section in the same sense in which it is applicable to all such enactments, and really could not alter the construction of the words with regard to the matter in question. On the other hand, if the Court below meant that there was something peculiar to this statute, or the subject-matter of it, which would have the effect of restricting its application as suggested, then I must say that it does not seem to me that there is anything in the language of the Act or its subject-matter to lead to the inference that the legislature intended so to restrict it. Though the usefulness of the case of

Baker v. *Thorogood* (1) for the purposes of our decision seems to me to arise principally from the declaration there made by Dr. Lushington of the practice of the Ecclesiastical Courts, yet I also think that the case is an authority against the construction of the Statute of George III., which the Court below adopted. It is to my mind impossible to suppose, as has been suggested, that Dr. Lushington overlooked that statute. But what he there said, if he did not overlook it, was said at a time when obedience in the future was impossible, as it is said in this case to be. If the judgment in the Court below is right, then it seems to me impossible to escape from the conclusion that what Dr. Lushington said in *Baker* v. *Thorogood* (1) was wrong. But I must say that I think that he was right, and I must respectfully differ from the judges below. For these reasons I am of opinion that the decision of the Queen's Bench Division, making absolute the rule for a habeas corpus, was wrong and must be reversed. What the result of this decision may be I do not know. I do not think that it is our business to consider that. All we can do is to allow the appeal and set aside the order of the Court below. Whether the result is that Mr. Cox can be re-arrested I give no opinion. I leave those who have to consider it, to consider what course they will take, though I almost hope they may see their way to the conclusion to let Mr. Cox alone unless he commits further illegal acts. I wish in conclusion to say that I do not think the question what may be the true construction of the 2nd section of the Act of George III. in any way affects our construction of the 1st section. I incline to think that it gives an alternative mode of procedure in cases within the 1st section, but it is not necessary to decide the question.

BOWEN, L.J. This is a case of considerable importance in more than one respect. It is the first time in the history of this Court that there has been an appeal against the order of the Court below discharging a person in custody from prison on habeas corpus. It is argued in the first place that no such appeal lies. Upon consideration of the terms of the Judicature Act it appears to me that there are no words which can have the effect

(1) 2 Curt. Eccl. Rep. 632.

1887

EX PARTE REV. JAMES BELL COX.

Bowen, L.J.

of excepting such an order from the general provision as to appeals; and that there must therefore be an appeal even from an order discharging the prisoner from custody. In considering the question whether the order of the Court below was rightly made, we have not to discuss a discretion exercised by the Court below. If their order releasing the prisoner had been a matter of discretion, it would be very difficult to persuade us on appeal to reverse such an exercise of discretion, but in truth the decision below turned on a pure matter of law and on the construction of an Act of Parliament. We are bound to construe the Act, and, if we do not agree with the construction put upon it by the Court below, we are bound to say that their order was wrong. It was said that to construe the Judicature Act as rendering orders of the Queen's Bench Division for the discharge of prisoners on habeas corpus subject to appeal, would be to construe the Act unfavourably to the liberty of the subject. The answer to that appears to me to be twofold. Beyond the general presumption in favour of the liberty of the subject, there is nothing either in the Act itself or in the subject-matter to prevent us, if the words are clear, from holding that there is an appeal in cases of habeas corpus; and it does not seem to me that the view that there is no appeal is necessarily more favourable to the liberty of the subject. Appeals against orders of discharge are not, as it seems to me, likely to be more numerous than appeals against orders of the opposite kind. Therefore to extend the right of appeal to cases of habeas corpus is not necessarily to diminish the safeguards for liberty, but rather to give additional chances of procuring freedom to the prisoner. Whatever construction applies to orders of the one kind must, in my opinion, apply to orders of the other. No one says that an order which keeps the prisoner in prison is not the subject of appeal. It must follow, I think, that an order discharging the prisoner is the subject of appeal.

I therefore come to the question as to the construction of 53 Geo. III., c. 127, and the position of Mr. Cox under that statute. Mr. Cox not having obeyed the monition of August 19, 1885, which directed him to refrain from certain practices, on June 13, 1886, a suspension was published and served upon him, whereby he was suspended from his clerical office for six calendar months.

1887

EX PARTE REV. JAMES BELL COX.

Bowen, L.J.

Notwithstanding such suspension he did officiate. He thus broke the command of the Court, and a significavit was directed by the judge to issue in respect of his disobedience. It so happened that legal proceedings had been taken for a prohibition, and the promoters of the suit, as was very proper and reasonable, did not put in force the process for contempt while these proceedings were pending, and so the period during which the suspension was in force became exhausted. It is clear that the order of suspension was disobeyed at least once during the six months, but we do not know whether or not it was obeyed during the remainder of the time. On these facts this curious point is raised. The argument for Mr. Cox must come to this: that at the end of the six months, if in prison under a writ de contumace capiendo, the contumacious person would have a common law right to be discharged without any application to the ecclesiastical judge; or, in other words, that the operation of the writ of imprisonment would then be at an end. It seems to me that in administering the provisions of a statute of this kind, relating to the imprisonment of contumacious persons, there are two points of view, and that possibly an Ecclesiastical Court deals with the matter from a somewhat different point of view from that which a Court of Common Law must take. It may be, for aught I know, that ecclesiastical judges use their powers in this respect by way of compelling obedience in the future, as being the main object that they have in view; and that a judge of an Ecclesiastical Court, in a case in which it is no longer essential for the objects of the suit to keep a person in prison, may let him go on the ground that the objects of the imprisonment have been fulfilled or exhausted. Assuming that to be so, that would be a matter for the discretion of the ecclesiastical judge. But a person, who comes to a Common Law Court for a habeas corpus, must shew a legal right to be discharged. The question is not whether, if he had gone to the ecclesiastical judge, that judge might have let him go; the question is, whether he is entitled to demand his release from the Common Law Court. In order to make out that proposition he must shew that the writ under which he is confined is invalid or exhausted, and that he is therefore entitled to his liberty. It is argued that Mr. Cox was imprisoned by virtue of the provisions of 53 Geo. 3, c. 127;

1887

Ex parte Rev. James Bell Cox.

Bowen, L.J.

and that the object of the imprisonment under that Act was either to enforce obedience during the suit or to enforce the doing of something during the time within which it can be done; and that, as soon as that period had expired, whether the end in view was accomplished or not, the object of the summary interference was exhausted, and the power of imprisonment came to an end. The statute 53 Geo. 3, c. 127 was, as it appears to me, a statute which was intended to alter the old law as to excommunication so far as it was used merely for the purposes of compelling obedience or punishing contempt in a summary manner. The former system utilised the process of excommunication for these purposes, with many disadvantages which it is not necessary to recapitulate. The 53rd Geo. 3, after reciting that it is expedient that excommunication should be discontinued, save in certain cases, proceeds to enact the provisions of s. 1, which we have to consider. That section divides itself into two parts. The first branch of the section is that which enables the Ecclesiastical Court to deal with the offender, the writ de contumace capiendo being the instrument to be used; the second branch of the section is that which states how in certain specified cases the offender may procure his release. It seems to me that the fallacy underlying the arguments of the counsel for Mr. Cox and, if I may respectfully say so, the judgment of the Court below, lay in the assumption that the earlier branch of the section and the later necessarily covered exactly the same matter. We must first consider the earlier part of the section. Is it true that the only object of the statute was to prevent disobedience or compel obedience to the particular order in future as against the party whose liberty was to be interfered with? The Master of the Rolls has called attention to the importance of remembering the distinction between the general objects of punishment and the special objects of summary process, but the reasoning of the Court below, and a great part of the argument of Mr. Cox's counsel, depend on their being able to establish that prevention of disobedience in the narrower sense is the only object of the earlier portion of the section. The section enacts that in all cases cognizable in the Ecclesiastical Courts when any person or persons having been duly cited to appear in any Ecclesiastical

Court, or required to comply with the lawful orders or decrees, as well final as interlocutory of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the presence of such Court, no sentence of excommunication shall be given or pronounced, save in the particular cases thereafter to be specified, but instead thereof the person may be declared contumacious, and a writ de contumace capiendo may be issued.

I pass by the third case of contempt in the face of the Court with this observation only, that at all events it is an instance to shew that the Act was not intended merely for prevention of disobedience or to compel obedience in future, but also to some extent for the punishment of matters past, so far as might be necessary to insure the administration of justice in the Court.

Taking the two earlier cases of neglect or refusal to appear, and neglect or refusal to obey an order or decree, can it be said that the section only applies to certain definite things which can be done in the future, and that the imprisonment is only to be inflicted while those definite things can be done; and, if they can no longer be done, the section does not apply? The words of the section are perfectly general, and I am unable to see why its construction should be narrowed, so as to limit its application to cases where some definite act is required to be done which can still be done in compliance with the order, or the performance of which at a later date can wipe out the failure to perform it earlier, as for instance in the case of appearance, and so to render it inapplicable to other cases where a subsequent performance of the thing ordered cannot amount to obedience to the order or decree of the Court.

When we come to the second branch of the section, we find that it specifies three cases in which the offender can by doing something obtain his release. If he has been committed for non-appearance, he may appear; if he has been committed for not having obeyed an order and he can still obey it, he may obey it; if he has been committed for contempt in the face of the Court, he may make due submission; and thereupon he is to be released.

1887

Ex parte Rev. James Bell Cox.

Bowen, L.J.

There are alternative views of this second branch of the section. If the contention is correct that there are no means of releasing a man imprisoned under the Act except as provided by this section, it seems to follow that it must always be possible to appear or obey in every case, or else the man imprisoned under the section would be shut in for ever. But is it always possible to appear or to obey? If the suit were over, could the party appear? However, I pass from that, for possibly there may be some process by which that case might be met. But with regard to obedience, I should not hesitate to say that a man cannot obey an order which is complex, and of which he has disobeyed part, by obeying the rest. Where an order is continuous for a certain period of time, and a man has disobeyed it for part of the time, he can never escape by saying that he has obeyed it for the subsequent part of the time and that the period has now elapsed. There may be many reasons why the judge of an Ecclesiastical Court, if applied to, might think it right to release him, but I cannot see how, in such a case, he could have a right to be released as having obeyed the order. It seems to me that we should be driven, if we accepted the argument of the counsel for Mr. Cox, into the strained and casuistical view that a man is to be considered as having obeyed the order, because the time for obedience has elapsed, or the reductio ad absurdum that a man who has once disobeyed part of the order can never be released under the Act. Is there no alternative? The opposite view is that s. 10 of the Act of 5 Eliz. c. 23, is to be read into the 1st section of the Act of George III., and that all the rules and regulations that applied to the old writ de excommunicato capiendo and the provisions of the Act of Elizabeth are to be applied mutatis mutandis to the new statutory writ. If that be so, and a construction, which I think the right one, be put upon the 10th section of the Act of Elizabeth, then there will be a way in which a person who is in the category of having disobeyed an order of the Ecclesiastical Court, and who never can comply with the order fully, can nevertheless obtain his release from custody. That is by making submission and satisfaction, which is the way, by which under the 10th section of the Act of Elizabeth a man did obtain his release. Is it not common sense that the 10th section of

the Act of Elizabeth should be read into the Act George III., for observe how luminous it seems to make the 1st section of the latter Act? It then comes to this: in the cases in which a person can still obey, where the act required to be done is a thing which can still be done, and there is still a locus penitentiæ, he can obey, and is then to be released; but where, owing to the terms of the order it is impossible any longer to obey it in full, because a part of the order is already broken irretrievably, then he may come and make submission in the manner referred to in the 10th section of the Act of Elizabeth.

So reading the section makes it consistent with common sense, and thus read it in substance gives the Ecclesiastical Courts the same power of dealing with their process as other courts, subject of course to the control of the Common Law Courts if they exceed their jurisdiction. The counsel for Mr. Cox have endeavoured to satisfy us that s. 10 of the Act of Elizabeth ought to receive a meaning which would make it only applicable to cases where a party has made submission between the arrest and the return of the old writ de excommunicato capiendo into Court, which could not take place for twenty days; and that the object of the section was to reserve the right of the party to come in and make submission within that interval. It was alleged that it applied only while the person excommunicated was in the custody of the sheriff, which was before the return of the writ. I cannot see anything in the language of this section to confine its operation to that period. The *Bishop of St. Davids' Case* (1), the forms in Fitzherbert de Natura Brevium, and in the Registrum Brevium would seem to shew that the person excommunicated remained in the sheriff's custody throughout, unless possibly where the Court made some special order. It was argued that the term "absolve," as used in the 10th section, was one applicable to excommunication, and that to read it into an Act abolishing excommunication except in certain cases, was to read it into a context in which it had no fit place. I do not think that argument is a sound one. When you have to incorporate the provisions of one statute with another, you read in as much as is applicable. If for any reason a portion of the matters con-

(1) 1 Salk. 106, 294; Ld. Raym. 817.

1887

EX PARTE REV. JAMES BELL COX.

Bowen, L.J.

tained in the incorporated provisions is useless or inapplicable to the new statute you drop out that portion. If the word "absolve" were applicable only to the process of excommunication, still I should not think that any reason for not reading into the later Act such parts of the section as would be applicable to the process given by that Act, leaving out anything that was applicable solely to excommunication. It was argued that ss. 2 & 3 of the Act of George III. afforded strong reasons for supposing that the view put forward on behalf of Mr. Cox was correct. I do not desire to wander from what seems to me to be the real point. I am content to say with regard to those sections that it seems to me that there are many cases in which they would have an ample application without the construction of s. 1 that is contended for. It does not appear to me that the form of the writ in the schedule to the Act of George III. is conclusive one way or the other. If s. 10 is to be read into the Act, then the "satisfaction" mentioned in the form may be in the manner provided for in the 1st section, or in any other way available. On the other hand, if the power of issuing the writ of deliverance is restricted as contended, then the word "satisfaction" must have a narrower meaning. I am strongly of opinion that the only way in which the statute of George III. can be read intelligibly is by reading it with the provisions of the 10th section of the Act of Elizabeth. I cannot see anything in its terms to shew that its object was confined to preventing a person from continuing an offence or to compelling him to do or not to do something ordered to be done or not to be done during a certain period, or that it was intended to fetter the action of the Ecclesiastical Court by any such limitations. The view of the Court below seems to have been based on a construction of the Act which, as I have endeavoured to shew, is not the true one. They say that the object of the statute is to compel obedience to the order in the future. Even if that were so, I do not know that it would necessarily follow that, as soon as that object came to an end, the person who had disobeyed the order would be entitled to his discharge. I should hesitate without further consideration to come to the conclusion that it was intended that the prison-door should fly open directly the period of suspension was over. It does not seem to me likely

1887

EX PARTE REV. JAMES BELL COX.

BOWEN, L.J.

that the legislature would so provide. But is the object of the section confined to compelling obedience in the future? It is alleged that there are authorities to that effect. It is therefore necessary to examine such authorities. I do not wish in so doing to blink the fact that I do see traces in the language used by Lord Penzance and other judges of Ecclesiastical Courts of a train of thought to the effect that, inasmuch as this summary process of imprisonment is used really for the purpose of compelling obedience, they are only too glad, if the object of it has ceased to exist or can no longer be attained, to see their way to putting an end to an interference with the liberty of the subject which has become useless. That merely comes to this. It is an exercise by the ecclesiastical judge of his own inherent power to control and direct the operation of his own process. It is quite a different thing when it is a question of shewing to an outside common law tribunal that the person imprisoned is entitled to his discharge at law. Having made that general observation, I proceed to deal with the authorities. I take first the case of *Reg.* v. *Thorogood.* (1) The Court below say in relation to that case that it was there said by the Court of Queen's Bench that under 53 Geo. 3, c. 127, imprisonment was not inflicted by way of penalty, but merely for enforcing execution of the sentence pronounced by the Court. The way in which I read that decision is this: one of the points there made was that, the writ de contumace capiendo not containing the addition of the party, this was a ground for discharging him from custody by reason of the provisions of 5 Eliz. c. 23, s. 13, and it was argued that the imprisonment under the writ was a pain or forfeiture within that section. All that the Court decided on that point was that imprisonment under the Statute of George III. was not a pain or forfeiture within the Statute of Elizabeth, but merely the result of the writ itself, and for the purpose of carrying out its object. What the Court said was this: "Looking to the Act, 5 Eliz. c. 23, we find that the writ is not vitiated, but only the pains and forfeitures enacted by that statute, and which are subsequent to the writ are made void. Imprisonment is not inflicted on this occasion by way of penalty, but is under the writ itself, and

(1) 12 Ad. & E. 183.

1887

Ex parte Rev. James Bell Cox.

Bowen, L.J.

merely for enforcing the execution of the sentence pronounced by the Court." It seems to me to be misreading the words there used to say that the Court intended to decide that the only object of the Act of George III. was to prevent particular things from being done, or to compel their being done in the future.

I then come to the case of *Hudson* v. *Tooth* (1), to which the Court below refer as one in which Lord Penzance lays down the purposes for which an inhibition is granted, the subject they were discussing not being that but the purposes for which a writ de contumace capiendo could be issued. I wish to call special attention to the language used by Lord Penzance for, with great respect, I think my learned Brothers in the Court below have missed the exact effect of it. He says (at p. 139), "But it was in Mr. Tooth's power at any moment after his arrest to regain his liberty, and not only that, but to get rid of the inhibition and be restored to the exercise of his duties in the parish, if he were willing to undertake to discontinue the practices complained of." What was he speaking of? Obviously of the case of the delinquent's coming to the Court and promising to obey in future; but a promise to obey is not obedience. The Statute of George III. does not speak of a promise to obey but of obedience. Can it be said as a matter of law that a promise to obey is equivalent to obedience? The language of Lord Penzance cannot have meant that, by promising to obey, Mr. Tooth could have entitled himself to his discharge on habeas corpus. The case of *Dean* v. *Green* (2) seems to me to call for no further observation than that it is not a case really in point. There the time had gone by during which the suspension could be usefully enforced, and it seems to me that the learned judge, who knew what he had granted his process for, might be of opinion that for the purposes of his own jurisdiction he was justified in discharging the prisoner as if the order had been obeyed. The case falls far short of shewing that there is a right of discharge which can be enforced in a Common Law Court outside the Ecclesiastical Court.

Baker v. *Thorogood* (3) is in my opinion an authority on which

(1) 2 P. D. 125. (2) 8 P. D. 79.
(3) 2 Curt. Eccl. Rep. 632.

1887

EX PARTE REV. JAMES BELL COX.

Bowen, L.J.

the counsel for the appellant is entitled to rely. The position of affairs in that case was as follows. The defendant was cited for non-payment of church-rates not exceeding 5*l.*, and refused to appear. A writ de contumace capiendo had been issued under which he was committed to prison. He would neither pay nor appear nor take any of the necessary steps to get released. Under these circumstances an Act (3 & 4 Vict. c. 93) was specially passed dealing with such cases, by which the judge was entitled to release the prisoner after a certain time upon payment of the rate and the costs lawfully incurred by reason of the custody and contempt of such party. When the case came before the judge, what he really had to consider was whether he could lawfully exercise the power given by the Act in question with regard to this impracticable person. It is to be observed that, when the case came before him, the costs in the Ecclesiastical Court had been taxed, and it is obvious that the judge knew they were going immediately to be paid by some kind friend of the prisoner's, and so the suit was practically at an end, and no question of the prisoner's appearance arose. Therefore the judge so treated the case, and the only question was how the man was to be got out of prison. So it became necessary that the judge should consider the old practice, and the effect of 3 & 4 Vict. c. 93, viewed in relation thereto. The case was not one which came within the latter part of the 1st section of the Act of George III. The man could not get out under the machinery given by that section, because he would not appear or obey. The judge was not therefore considering what was equivalent to appearance or obedience under that section, but what since the Act of George III. was the practice where that specific machinery was not applicable. He says that the practice was, that the party should purge his contempt, which could only be done on payment of costs incurred in the Ecclesiastical Court in consequence of such contempt, and take the usual oath to submit to the lawful commands of his ordinary. He must have been referring to the old practice reserved by the Statute of Elizabeth as applying to the class of cases where the prisoner under the writ de contumace capiendo could not obey. It is suggested that Dr. Lushington was mistaken as to the practice of his own Court, but he was a most careful judge, and

1887

EX PARTE REV. JAMES BELL COX.

Bowen, L.J.

I think must be taken to have satisfied himself as to the practice. He seems to me in that case to have construed the Act of George III. exactly as we construe it. I regret to have to set aside an order in favour of the liberty of the subject, and I regret to have to differ from the construction put on the statute in the Court below. But we have simply to construe the words of the statute, and upon my view of its meaning it appears to me that the decision of the Court below should be reversed.

FRY, L.J. Having regard to the importance of this case, and the fact that we are differing from the Court below, I wish shortly to state my reasons for thinking that their decision was wrong. Two points were urged upon us on behalf of the respondent, one being in the nature of a preliminary objection, the other being the main point as to the nature of the writ de contumace capiendo. The first point does not appear to me to be well founded. The 19th section of the Judicature Act, 1873, gives us power to hear and determine appeals from any judgment or order, save as thereinafter mentioned. Having regard to the fact that the Act was intended to introduce a new system of procedure, I think the only question on the terms of that enactment must be whether among the exceptions afterwards mentioned habeas corpus is included. It cannot be contended that it is. Various considerations were adduced as shewing that it would be convenient that there should be no appeal in cases of habeas corpus. Considerations may also be adduced to the contrary, but we are not at liberty to attend to such considerations one way or the other. We have to look to the words of the Act. Therefore I think we must entertain the appeal; and so I come to the main question of law raised. It arises in this way. On June 13, 1886, a suspension was published and served on Mr. Cox, by which he was suspended from his clerical office for six calendar months. On June 20, 1886, he disobeyed that suspension by publicly officiating in his church. On July 30, he was pronounced to be in contempt, and a significavit was issued. On May 2, 1887, a writ de contumace capiendo was issued, and on June 4, Mr. Cox was arrested under that writ. The writ, which followed the form given in the Statute of George III., required the sheriff to keep him in custody until he should have

made satisfaction for the said contempt. The argument amounted to this, that, if Mr. Cox had been taken on such a writ within the period of suspension, at the end of that period he would have been entitled to his discharge without any further proceedings. It could only be so on one of two grounds, either that he had made satisfaction, or that, although the writ requires the sheriff to attach him till he shall have made satisfaction, he is nevertheless entitled to his liberty on some other contingency. It is difficult to see how a person, who has manifestly been at one time contumacious and who cannot shew that he has obeyed the order of the Court at any subsequent date, can be said to have been obedient: and, that being so, how can such a person be said to have made satisfaction? If he has not made satisfaction, then we have to see whether there is any other ground at common law or by statute on which a person can be entitled to his discharge at some other time than that specified in the writ. It is hardly necessary to say that, if a person imprisoned would be entitled to his discharge at the expiration of the period of suspension, it follows that a person could not be taken under the writ after the period of suspension had expired. Before proceeding further, I desire to make this observation. It appears to me that the term "making satisfaction" was one of well known meaning in the ecclesiastical law, and that the writ de contumace capiendo is in this respect manifestly modelled on the old writ de excommunicato capiendo, which required the sheriff to hold the person excommunicated, "donec sanctæ ecclesiæ, tam de contemptu quam de injuria ei illata, ab eo fuerit satisfactum." Thus both the old writ de excommunicato capiendo and the writ de contumace capiendo require the sheriff to keep the person against whom they respectively issue till he shall make satisfaction. In the present case it cannot be shewn that there has been obedience or any other satisfaction in fact. Having said this much concerning the form of the writ, it becomes necessary to consider the operation of the Statute of George III. in order to see whether the contention for the respondent with regard to it is correct. The effect of that argument is that the statute points out the modes in which satisfaction can be made. The 1st section provides for three cases, viz., neglect or refusal to appear, neglect or refusal to

1887

Ex parte Rev. James Bell Cox.

Fry, L.J.

pay obedience to an order or decree, and contempt in the face of the Court, and enacts that no excommunication shall be pronounced in those cases. It then goes on to provide for a new form of writ de contumace capiendo which is to be put in the place of the old writ de excommunicato capiendo. The section then applies to such new writ all the rules and regulations, not thereby altered, by law applying to the abolished writ, and particularly the provisions of the Act of Elizabeth. It seems to me that the true construction of that enactment is that the provisions of the Act of Elizabeth are to apply to the new writ mutatis mutandis. Then comes the provision which gives rise to the difficulty. It provides for three cases in which the contumacious person may be pronounced absolved and released; and at first sight these three cases seem to correspond with the three cases in which the old writ is abolished by the earlier part of the section. The three cases are these: first, that of due appearance of the party so cited and not having appeared; secondly, that of obedience of the party so cited and not having obeyed; and thirdly, submission by the party so having committed a contempt in the face of the Court. But are these three cases co-extensive with the cases in the earlier part of the section? On consideration it seems to me that they are not. Take the first case: that, of due appearance. What is the party cited to do? The citation shews that he is to appear and make answer to the matters alleged. After a suit has come to an end and a final decree has been pronounced, and all answer to the proceedings has become unnecessary, it is plain that no due appearance could be made; and therefore we should be driven to the conclusion that, if a person were contumacious, and refused to appear till due appearance became impossible, then it would be impossible to relieve him from imprisonment, assuming this section to be the only provision for his release. I will proceed to the second case, which is that really in question; that is the obedience of the party who has disobeyed. It seems to me that an order may require obedience in three different ways. It may require something to be done without defining any particular time at which it is to be done. If a person has neglected or refused to do the thing, as no particular time is specified, obedience may yet be rendered within the meaning of the section. Another case is

where a single act is required to be done at a defined time, and that time is past; as for instance, if a man were required to communicate on a given day. Such an order cannot be obeyed after it has once been disobeyed. A third case is where a man is required to do or not to do something during a certain period of time, as in the case of this suspension, and during a portion of the time he disobeys the order. It is obvious that afterwards there never can be a full obedience to the order; it can only then be partially obeyed. The respondent's counsel argued that in such a case the disobedient person could only be imprisoned for the remainder of the period, the result being that the longer he has acted in disobedience to the order, the shorter will be the term during which he may be imprisoned. With regard to this second case it is clear that it can only apply to certain cases of disobedience. With regard to the third case of submission after a contempt, it is unnecessary for me to say anything except to concur in the observation that it shews that the writ was not intended to be issued only in cases where obedience in the future was to be procured. The examination of the latter part of the section therefore convinces me that one of two conclusions must follow: either persons may be imprisoned under the Act under such circumstances that it is impossible for them to escape from the consequences of their previous contumacy, or there is some other mode of escape than those specified in the latter part of the section. We find that the section applies to the writ de contumace capiendo all the provisions of the Act of Elizabeth, one of which preserves the jurisdiction of archbishops, bishops, and all other persons having authority to certify any persons excommunicated to accept and receive the submission and satisfaction of such excommunicated persons. I conclude therefore that the Statute of George III. has pointed out certain cases in which satisfaction may be made under the statute, leaving other cases in which it must be made otherwise under the old practice. In my judgment the form of the writ, which requires the sheriff to keep the contumacious person till he makes satisfaction, really agrees with the conclusion at which I arrive, inasmuch as it refers to satisfaction generally, not only to satisfaction according to the statute.

1887

EX PARTE REV. JAMES BELL COX.

FRY, L.J.

There is one authority of the greatest importance in favour of my conclusion, viz: *Baker* v. *Thorogood*. (1) It appears to me that there Dr. Lushington came to the conclusion that in a case where satisfaction had not been made under the Act of George III. the old practice under the Act of Elizabeth applied. It is suggested that what Dr. Lushington said in that case he said inadvertently, in forgetfulness of the Statute of George III. That appears to me a very violent assumption. He had obviously considered the case carefully, and he delivered an elaborate judgment on the case, with all the circumstances of which he was familiar, prefacing such judgment by a statement of the law before the passing of the statute with which he was dealing. It seems to me clear that he had arrived at the conclusion that the stage was past at which there could be an appearance; that he treated the suit practically as at an end. It is true that the payment of the amount had not been already made, but so well was it known that it was to be, that the costs had been taxed. It is clear to me that Dr. Lushington treated the case as one in which the party could not appear under the Act of George III., and that, therefore, in the absence of the special legislation, the old practice under the Act of Elizabeth would have applied. The case, therefore, is a strong authority for saying that the learned judge considered that in cases not within the latter part of the 1st section of George III. the procedure under the Act of Elizabeth applied.

It is said that there are decisions which establish that the object of the writ de contumace capiendo is only to enforce future obedience to the order disobeyed. I agree with the explanation given by the Master of the Rolls and my brother Bowen of expressions in the cases to the effect that the object of the writ was to enforce obedience. I also agree with what my brother Bowen has said as to the effect of *Reg.* v. *Thorogood*. (2) The only point there was whether imprisonment under the writ was one of the pains and forfeitures avoided under the Act of Elizabeth by the absence of the addition of the party. The Court held that it was not, being merely a proceeding on the writ itself. When they said that the imprisonment was not by way of penalty, they meant that it was not a penalty within the Act of Elizabeth. The

(1) 2 Curt. Eccl. Rep. 632. (2) 12 A. & E. 183.

1887

Ex parte Rev. James Bell Cox.

Fry, L.J.

statement that the writ was merely for the enforcement of the sentence of the Court seems hardly correct as applied to that case, for the imprisonment of the defendant there was for non-appearance. That consideration is immaterial with regard to the actual point decided, but would be very material if the few words cited from the case are to be treated as an authority for the purpose for which they were cited.

It was further argued that the 2nd section of the Act of George III. gives another mode of proceeding applicable to such a case as this. I found it impossible to ascertain from counsel on either side what they conceived to be the exact import of the term "definitive sentence" in ecclesiastical law. I will only say on this point that it does not appear to me clearly made out that, where there is a contempt which would not come within the 1st section, it would therefore necessarily come within the 2nd section. Having regard to the obvious intention of the legislature to abridge the operation of the process of excommunication, I doubt whether that can be the true explanation of the Act. For the reasons before mentioned I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Girdleston.*

Solicitors for respondent: *Brooks, Jenkins, & Co.* (1)

(1) Counsel for the appellant applied for costs of the appeal and of the proceedings in the court below. Counsel for the respondent referred to *Green* v. *Lord Penzance* (6 App. Cas. 657, at pp. 676, 684). The Court said they would consider the question of costs; and on a subsequent day they gave the appellant the costs of the appeal, but stated that, though they were of opinion that they had jurisdiction to give the costs in the court below, they declined in the exercise of their discretion in this case to give these costs to the appellant.

E. L.

1887
Nov. 21.

IN RE CROWTHER. EX PARTE ELLIS.

Bankruptcy — Deceased Debtor — Administration of Estate — Order affecting Rights of Stranger — Jurisdiction — Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 125.

A county court judge sitting in bankruptcy has no jurisdiction, unless by consent, to order payment to the official receiver of money received under a garnishee order attaching a debt due to the estate of a deceased debtor which is being administered according to the law of bankruptcy under s. 125 of the Bankruptcy Act, 1883.

APPEAL from an order of the judge of the county court at Huddersfield directing the appellant to pay to the official receiver money which had been received by the appellant under garnishee orders attaching debts due to the estate of a deceased debtor, which was being administered according to the law of bankruptcy under s. 125 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

Herbert Reed, for the appellant. The county court judge had no jurisdiction to make this order. Sect. 102 of the Bankruptcy Act, 1883, cannot give jurisdiction, for that section is not contained in part III. of the Act, which is made applicable to cases of administration of estates of deceased debtors by s. 125, sub-s. 6 : *In re Hewitt.* (1) Such an order, affecting not only the estate of the deceased debtor but also the property of another person, cannot be made : *Ex parte Official Receiver, In re Gould.* (2) The claim of the official receiver should be enforced by action. He can claim no higher title than the deceased debtor himself would have had, and must resort to the ordinary tribunals : *Ex parte Dickin, In re Pollard* (3); *Ex parte Brown, In re Yates.* (4) Sect. 125 throughout preserves the distinction between bankruptcy and the administration of the estates of deceased debtors. For instance in sub-s. 10 it contains a definition of "Court," which is not the same as that in s. 168.

M. J. Muir Mackenzie, for the official receiver. The judge had jurisdiction to make the order. Sect. 125 provides for the administration of estates according to the law of bankruptcy, and the question here is whether the appellant is a secured creditor ; that is a question for the Court of Bankruptcy. The provisions as to

(1) 15 Q. B. D. 159.
(2) 19 Q. B. D. 92.
(3) 8 Ch. D. 377.
(4) 11 Ch. D. 148.

realization of property are incorporated, and cover the present case: s. 50, sub-s. 2. Sect. 102 is impliedly incorporated, though not expressly.

[As the Court expressed no opinion on the merits, the arguments on that question are omitted.]

CAVE, J. I am of opinion that this appeal ought to be allowed.

Sect. 125 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), has given power to the Court of Bankruptcy to administer the estate of a debtor who has died insolvent. Unless there is some provision to the contrary the Court in acting under this section must follow the practice of the Chancery Division of the High Court of Justice with regard to the administration of the estates of deceased persons. In the High Court an application for an order such as that now appealed against would not be entertained without the consent of the person against whom the order was asked for. In order to establish that the county court has jurisdiction to entertain such an application it is necessary to shew some express provision giving to the county court a power which the High Court does not possess. There would be a certain amount of convenience in the existence of such a power, for the objection to the jurisdiction is often frivolous. For instance in the present case if the objection had been allowed in the county court, a plaint would have been issued in the same court, in an action, in which the question would have been tried before the county court judge. That, however, is an objection which cannot be taken here. The question is whether there was jurisdiction to make the order. I have come to the conclusion that there was not, and therefore our judgment must be for the appellant, but as he needlessly took the objection, and also appeared before the county court judge, and contested the question on the merits, we think the proper order will be to allow the appeal with costs in this court, but to make no order as to the costs in the court below.

A. L. SMITH, J., concurred.

Appeal allowed; leave to appeal refused.

Solicitors for appellant: *Burn & Berridge, for Ramsden, Sykes, & Ramsden, Huddersfield.*

Solicitor for respondent: *The Solicitor to the Board of Trade.*

P. B. H.

1887
Nov. 21.

In re WOODHAM. Ex parte CONDER.

Bankruptcy—Costs— Sheriff—Execution—Expenses incurred for Benefit of Property seized—Costs of Execution—Charge on Goods—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 46, *sub-s.* 1.

Expenses incurred by a sheriff for the cost of cutting, carrying, threshing, and dressing corn which has been taken in execution, are not "costs of the execution" within the meaning of s. 46, sub-s. 1 of the Bankruptcy Act, 1883, and therefore if before sale notice of a receiving order against the execution debtor is served on the sheriff, and the goods are delivered to the official receiver or trustee, such expenses are not a charge on the goods, and must be disallowed on taxation of the sheriff's costs.

Appeal from an order of the judge of the county court at Bedford, reviewing the registrar's taxation.

An execution had been levied on the goods of the debtor, and while the sheriff's officer was in possession he incurred certain expenses in dealing with the goods seized. These expenses consisted of two sums of 10*l.* and 15*l.* respectively paid for the cost of cutting and carrying corn which had been seized while standing, and a sum of 10*l.* 5*s.* paid for the cost of threshing and dressing corn which had been seized after it had been cut and carried.

On September 11, 1886, a receiving order was made against the debtor, and on September 14, he was adjudged bankrupt.

Notice of the receiving order was served upon the sheriff, who then delivered the goods to the official receiver in accordance with s. 46, sub-s. 1 of the Bankruptcy Act, 1883. (1)

On taxation of the sheriff's costs, the registrar disallowed the three items above referred to.

The sheriff's officer, without carrying in before the registrar an objection in writing to such disallowance, appealed to the judge of the county court asking for a review of the taxation.

(1) 46 & 47 Vict. c. 52, s. 46, sub-s. 1: "Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge."

The judge reviewed the taxation, and allowed the three items in question.

The trustee appealed.

Lindsell, for the appellant. There are two questions, first, whether it was competent to the judge to review the registrar's taxation, and secondly, whether the items were properly allowed.

As to the first question the Appendix to the Bankruptcy Rules, 1886, by the 16th Regulation in part II., s. vii., provides for the carrying in before the taxing officer of an objection in writing to the disallowance of any items in any bill of costs, and by the 18th Regulation a right is given to apply to the judge for a review of the taxation, but only "as to any item or part of an item which may have been objected to as aforesaid." These provisions apply to all costs, including the sheriff's costs, and as they had not been complied with, the judge had no power to review the taxation.

Secondly, these items were not part of the costs of the execution within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 46, sub-s. 1, and therefore were not a charge on the goods. The expenses were not necessary, but were only incurred for convenience, and are not included in the table of fees allowed under 7 Wm. 4 & 1 Vict. c. 55, s. 2 (1). *Playfair* v. *Musgrove* (2) shews how limited the sheriff's duties are.

M. J. Muir Mackenzie, for the sheriff's officer. There was power to review the taxation. The Regulation as to objection in writing does not apply, for Part II. of the Appendix to the Bankruptcy Rules, 1886, in which it occurs, is headed "Scale of Solicitors' Costs," and has no reference to sheriffs' costs, but applies only to solicitors' costs, like Order LXV., r. 27, of the Rules of the Supreme Court, 1883. Under s. 104 of the Bankruptcy Act, 1883, the judge can review, rescind, or vary the registrar's order.

[CAVE, J. The Regulation in part II., s. vii. of the Appendix gives express power to review taxation; if that only applies to solicitors' costs, where is there any similar provision applicable to the sheriff's costs?]

(1) Chitty's Statutes, 4th ed., vol. v., pp. 1359–1361. This statute is repealed by s. 39 of the Sheriff's Act, 1887 (50 & 51 Vict. c. 55, passed 16th of September, 1887), and the fees are in future to be fixed under s. 20, sub-s. 2 of the Act of 1887.

(2) 14 M. & W. 239.

1887

IN RE WOODHAM. EX PARTE CONDER.

The Court has very full powers under s. 102 of the Bankruptcy Act, 1883.

Secondly, the position of a sheriff is altered by the Bankruptcy Act, 1883, for by s. 145 he must advertise before selling. Surely the expenses of so advertising would come within s. 46, sub-s. 1, and similarly these expenses, which were incurred to increase the value of the goods seized, ought to be allowed.

[A. L. SMITH, J. Why should anything be a charge on the goods for which the execution creditor would not be liable to the sheriff if there were no bankruptcy?]

Lindsell, was not heard in reply.

CAVE, J. I am of opinion that this appeal ought to be allowed on the merits, without regard to the question whether there was or was not a right to go before the county court judge in order to obtain a review of the registrar's taxation. It is not necessary to express an opinion on that point, but I have considerable doubt. I therefore wish to give no decision on the point, but to reserve my opinion until the question arises on some future occasion.

On the other point, I am of opinion that the charges were properly disallowed. The sheriff's officer clearly was not bound to incur these expenses. No statutory provision can be found giving liberty to incur them, or providing for their repayment if incurred. The sheriff is bound to levy and sell, and if he thinks that any expenses ought to be incurred while the goods are in his possession, he can get authority from the execution creditor to incur the expenses, and if he does so he can recover the amount from the execution creditor, or if authority is refused he need not incur the expenses. So also he may get authority from the execution debtor, and may recover the amount of the expenses from him; but there is nothing in any statute shewing any duty on the part of the sheriff to incur such expenses of his own motion. It is urged on behalf of the sheriff's officer that these expenses were incurred for the advantage of the execution creditor, and it may also be suggested that they were for the advantage of the execution debtor; but the answer is that the sheriff's officer should have applied to the creditor, or to the debtor, for authority to incur the expenses, and if he had done so he would have been safe. Here the expenses were incurred

1887

IN RE WOODHAM EX PARTE CONDER.

without the consent of either the creditor or the debtor, and, although the result was a benefit to the property, I am of opinion that under s. 46, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict, c. 52), the amount of these expenses cannot be charged on the goods as costs of the execution, and therefore the registrar was right in disallowing the items in question, and this appeal must be allowed. As to whether there may be any other mode by which the sheriff can obtain payment of these expenses, I express no opinion, but he cannot obtain it in this way.

A. L. SMITH, J. I am of the same opinion, and I think that the General Regulations contained in part II. s. vii. of the Appendix to the Bankruptcy Rules, 1886, apply to solicitors' costs only, and do not apply to the costs of sheriffs.

Appeal allowed.

Solicitors for appellant: *Stibbard, Gibson, & Co., for Hooper & Co., Biggleswade.*

Solicitors for respondent: *Keen, Rogers, & Co.*

P. B. H.

IN RE HOLDEN. EX PARTE THE OFFICIAL RECEIVER.

Nov. 21.

Bankruptcy—Void Settlement—Costs of Trustees of Settlement—Lien on Trust Fund—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

Trustees of a settlement, originally valid, but which becomes void on the bankruptcy of the settlor, are entitled as against the trustee in bankruptcy to a lien on the trust property for expenses properly incurred in the performance of their duty as trustees.

The settlor of a post-nuptial settlement brought an action to set it aside. The trustees of the settlement defended the action, which was dismissed with costs, but the costs were not paid.

The settlor became bankrupt within two years after the date of the settlement, which accordingly became void under s. 47 of the Bankruptcy Act, 1883.

Held, that, as the settlement was originally valid, and as the costs of the action had been incurred by the trustees in the performance of their duty as trustees, they were entitled, as against the official receiver, to a lien on the trust fund for such costs.

APPEAL by the official receiver from the county court at Halifax.

On September 26, 1885, the debtor executed a post-nuptial

1887

IN RE HOLDEN. EX PARTE OFFICIAL RECEIVER.

settlement, by which he settled a sum of 323*l.* 15*s.* on the respondents in trust to pay the income arising therefrom to the debtor for his life, and after his decease in trust for the children of his marriage.

Shortly afterwards the debtor commenced an action in the Chancery Division of the High Court of Justice seeking to set aside the settlement on the ground that its execution had been obtained by undue influence. The respondents as trustees of the settlement defended the action. On March 9, 1887, Kekewich, J., gave judgment, dismissing the action, and ordering the plaintiff to pay the defendants' costs. These costs were not paid, and on March 30, 1887, the debtor was adjudged bankrupt on his own petition.

The official receiver applied that the settlement might be declared void under s. 47 of the Bankruptcy Act, 1883. (1)

The respondents did not resist the application to have the settlement declared void, but they claimed a lien for their costs of the action.

The county court judge ordered that the respondents should hand over the settlement to the official receiver, and declared that the respondents were entitled to a lien on 189*l.* 4*s.* for costs in the action, and 11*l.* 8*s.* 5*d.* for costs of the application, and directed that the respondents should pay the balance to the official receiver.

The official receiver appealed against so much of this order as declared that the respondents were entitled to a lien for costs.

M. J. Muir Mackenzie, for the official receiver, in support of the appeal. The order is wrong in declaring that the respondents are entitled to a lien, for the settlement having been declared void as against the creditors, they can have no lien, being trustees of a nullity: Lewin on Trusts, cap. xxxi., s. 7, part 2, paragraph 8.

(1) 46 & 47 Vict. c. 52, s. 47, by which "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy . . ."

1887

IN RE HOLDEN. EX PARTE OFFICIAL RECEIVER.

The settlement is void, as if it had never been made: *Curtis* v. *Price.* (1)

The respondents are trustees of a trust which has been declared to have no legal existence, and as such cannot establish any claim: *Elsey* v. *Cox* (2); *Smith* v. *Dresser* (3); *Ex parte Russell, In re Butterworth* (4); *Dutton* v. *Thompson* (5); *Ex parte Vaughan, In re Riddeough.* (6)

[A. L. SMITH, J., referred to *Ex parte Tomlinson, Re Boyce.* (7)]

Sidney Woolf, for the respondents. In all the cases in which costs of the trustees have been disallowed the deed was void ab initio, either as an act of bankruptcy or by 13 Eliz. c. 5, or else the costs were incurred in resisting the application to have it declared void. Here the deed was good until the bankruptcy, and would be good still but for the bankruptcy, so that all which was done under it is valid, and the costs in question were incurred, not in any attempt to defend the deed after the bankruptcy, but in resisting the debtor's attempt to set it aside before the bankruptcy. It was the duty of the respondents as trustees to defend the action in the Chancery Division, and they are entitled to the ordinary lien of trustees for expenses incurred in the execution of the trust: *Attorney-General* v. *Mayor of Norwich.* (8)

Mackenzie, in reply, referred to *In re Richards, Ex parte Official Receiver.* (9)

CAVE, J. I am of opinion that this appeal ought to be dismissed.

The respondents undertook to be trustees of a settlement, which was executed by the bankrupt on September 26, 1885. The settlement was post-nuptial, but it does not follow that there was anything wrong about it. A man may be unable to make a settlement at the time of his marriage, but he may afterwards find himself in a position to make one. If he does so, no doubt he must run the risk of the settlement being void in the

(1) 12 Ves. 89, 103.
(2) 26 Beav. 95.
(3) Law Rep. 1 Eq. 651.
(4) 19 Ch. D. 588.
(5) 23 Ch. D. 278.
(6) 14 Q. B. D. 25.
(7) 3 De G. F. & J. 745.
(8) 2 My. & Cr. 406, 424.
(9) 1 Morrell's Bankcy. Cas. 242.

1887

IN RE HOLDEN. EX PARTE OFFICIAL RECEIVER.

Cave, J.

event of his becoming bankrupt within two years of its execution, but it would be unfortunate to lay down such a proposition as that it is wrong to undertake the trusts of a post-nuptial settlement. The respondents in the present case undertook the trusts of such a settlement. They were met by an attempt on the part of the settlor to set aside the settlement. They had no interest personally in the matter, but they defended the action in the interest of those who would benefit by the settlement. They were successful, but at the cost to themselves of 189*l.* 4*s.* The settlor then filed a petition, and was adjudged bankrupt. An application was made to the Court on behalf of the official receiver that the deed should be declared void, and that the sum of 323*l.* 15*s.*, which was settled by it, should be paid over to him for the benefit of the creditors. The trustees raised no objection to the deed being declared void, but they said that, while the deed was still good, in the execution of their duty as trustees they had incurred a liability, and thereby saved the trust fund. On these grounds they ask to be indemnified out of the trust fund for the costs which they have incurred. That, I think, is a reasonable application. It is true that by the judgment in the action it was ordered that the bankrupt should pay the costs, but that order was made on the application of the trustees themselves, and there was no expression of opinion on the part of Kekewich, J., that they ought not to receive their costs out of the trust fund. They had defeated the settlor's attempt to upset the trusts of the settlement, and therefore it was right that an order for costs should be made against him. None of the authorities that have been referred to are opposed to the view which we take. Most of the cases where costs have not been allowed to trustees have been cases where they were trustees of a deed which was invalid when it was executed, for instance, where the deed itself was an act of bankruptcy; in such a case the trust is invalid when the trustee undertakes it. Again, where the trust was valid when the deed was executed, if the trustees resist an application to have it declared void under the Bankruptcy Act, and fail, it would be wrong to give them the costs thereby incurred. In such a case they know that the creditors have a right to apply to set aside the deed, and they must get the best advice

they can and decide what course they ought to adopt. Even there, as Jessel, M.R., said in *Ex parte Russell, In re Butterworth* (1), it is a hard case. There is this difference here, that the trustees were right in defending the deed in the action before Kekewich, J., and judgment was given in their favour, the result of which is that the creditors will get the balance of the trust money after the claim of the trustees is satisfied.

A. L. SMITH, J. I am of the same opinion. The decision which pressed me most was *Smith* v. *Dresser* (2); but the judgment shews in that case that the ground of the decision was, that the defendant knew, or ought to have known, that the deed was invalid; Lord Romilly, M.R., said: "In my opinion the defendant has mistaken his position in this matter. He was appointed trustee under a deed, the trusts of which were all invalid. He was, or ought to have been, aware of this fact before he began to act in the trusts, and he should have taken no step in the matter until he had satisfied himself that three-fourths in value of the creditors had assented to the deed. A very little inquiry would have made it clear that this had not been done." (3) At the end of the same judgment also the Master of the Rolls pointed out that it had been decided in a previous suit that the trusts of the deed were wholly void, and the defendant "could not, therefore, claim any of the rights incidental to a trust, which, in truth, never existed." (4) These statements in the judgment shew the distinction between that case and this.

Appeal dismissed.

Solicitor for appellant: *The Solicitor to the Board of Trade.*

Solicitors for respondents: *J. E. & H. Scott, for George Crossley, Halifax.*

(1) 19 Ch. D. at p. 602.
(2) Law Rep. 1 Eq. 651.
(3) Law Rep. 1 Eq. at p. 655.
(4) Law Rep. 1 Eq. at p. 656.

P. B. H.

1887
Nov. 3, 12.

CRAMPTON & HOLT *v.* RIDLEY & CO, McNAY, AND MACKAY, TRUSTEE IN BANKRUPTCY OF WINBY.

Arbitration—Costs—Mercantile Reference—Implied Contract to pay Arbitrators and Umpire reasonable Remuneration.

The parties in a mercantile dispute agreed to refer their differences to arbitrators (who were not in the legal profession), or in case of disagreement to their umpire. The arbitrators disagreed and appointed an umpire who made his award.

Semble, per A. L. Smith, J., that there was an implied contract by the parties jointly to pay the arbitrators and umpire reasonable remuneration for their services.

ACTION tried by A. L. Smith, J., without a jury.

Pitt Lewis, Q.C., and *F. Radcliffe*, appeared for the plaintiffs.

Bigham, Q.C., and *Danckwerts*, appeared for the defendants, Ridley & Co.

Danckwerts appeared for the defendant McNay.

The third defendant, the trustee in bankruptcy of Winby, did not appear.

Cur. adv. vult.

The facts and arguments appear in the judgment.

A. L. SMITH, J. This is an action brought by an umpire and an arbitrator to recover the sum of 328*l.*, being umpire's and arbitrator's fees payable, as it is alleged, to them by the defendants.

The facts of the case are as follows. By indenture dated July 2, 1878, Frederick Charles Winby, whose trustee in bankruptcy is one of the defendants, granted the sole and exclusive licence to the defendants Ridley & Co. to use his invention for improvement in rails for street tramways, subject to the terms and provisions in the indenture contained. In and prior to the year 1882 disputes arose between Winby and Ridley & Co. touching and concerning the licence so granted and the user thereof, whereupon on July 10, 1882, it was agreed between Winby and Ridley & Co. that such disputes should be referred to the award of William L. Holt and Thomas Fothergill McNay, civil engineers, or in case of disagreement to their umpire. By this

submission to arbitration it was also agreed "That the arbitrators or their umpire, as the case might be, might by their or his award order and determine what should be done by either party, and that the costs of the reference and award should be in the discretion of the arbitrators or their umpire, who might award by whom, to whom, and in what manner the same should be paid." Winby appointed Holt as his arbitrator and Ridley & Co. appointed McNay as theirs, and each undertook their respective appointments. The arbitrators thereupon agreed to appoint as umpire the plaintiff Mr. W. R. Crampton, the well-known engineer of 4, Victoria Street, Westminster, which appointment was made and accepted in the following letters:

"October 17, 1882.

"Dear Sir,—Mr. McNay informs us that he and Mr. Holt . . . . have agreed to appoint you as umpire, and he has asked us to inquire whether you will undertake the office, and, if so, to forward you the agreement of reference. Will you kindly let us know whether you will be good enough to accept the appointment?

"Yours truly,

"R. P. & H. Philipson & Cooper."

These gentlemen were solicitors for Messrs. Ridley & Co.

4, Victoria Street, Westminster, S.W.
"October 18, 1883.

"Dear Sirs,—In reply to yours of the 17th, requesting to know whether I will act as umpire in the case of Messrs. Ridley & Co. and Mr. Winby, I beg to say that I shall be happy to do so.

"Yours faithfully,

"W. R. Crampton."

The first meeting upon the reference took place before the two arbitrators sitting without the umpire, and at a meeting held on April 7, 1883, a question arose as to the costs of the arbitration, and, after a discussion which appears from the shorthand notes before me (1), an agreement in writing was come to between the

(1) The following is the passage referred to:—

Mr. *Edge* (counsel for Winby): "Can we agree as to what the arbitrators shall do with regard to their fees? Can we agree now to secure their costs between us?"

Mr. *Bigham* (counsel for Ridley

BIBL. LONDIN

1887

CRAMPTON & HOLT v. RIDLEY & Co.

A. L. Smith, J.

parties to the litigation through their respective representatives bearing date April 7, 1883. That agreement was as follows:—

"In the matter of an arbitration between Frederick Charles Winby and Ridley & Co., it is agreed between the parties that the arbitrators (Messrs. Holt & McNay) may, if they think fit, intimate their decision, each party agreeing to be bound thereby, previously to the making of the final and formal award, and the parties undertake that such of them as may be directed by the arbitrators shall pay such costs and charges of the arbitrators as they may direct." Contemporaneously with this agreement and indorsed thereon it was also agreed between the parties "that, in the event of the arbitrators disagreeing, the matter should be referred to the umpire W. R. Crampton by the arbitrators, and that the umpire should with them proceed to consider the matter and should make his award without the presence of counsel, solicitor, or witnesses, except that he might require the presence of either or both of the parties." On October 12, 1883, Mr. Holt and Mr. McNay formally by letter appointed Mr. Crampton as umpire, and therein expressed their desire that he would be good enough to take care that their fees past and future be paid to him on their behalf. Before Mr. Crampton moved in the matter the two contemporaneous agreements of April 7, 1883, and the submission to reference of July 10, 1882, were forwarded to him, and after the receipt of these documents on December 20, 1883, he first sat as umpire.

Mr. Crampton and the two arbitrators sat from time to time to consider the matters referred to them, and difficulties arose which do not appear to me material. Ultimately, however, on July 3, 1885, Mr. Crampton made his award, and thereby, among other things, awarded that Winby and Ridley & Co. should each bear his or their own costs of reference and pay half costs of the award, and that if either party should in the first instance pay

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& Co.): "I think so. That would be the most convenient thing to do."

Mr. *Edge*: "Well, let it be an undertaking between the solicitors that the arbitrators' charges are to be paid."

Mr. *Edge* then intimated to the arbitrators that it had been agreed that an undertaking should be given by either side to guarantee their costs provided neither side took up the award, and that those costs should be borne, as they, the arbitrators, should direct.

the whole or more than half the costs of the award, the other party should repay him or them so much of the amount as should exceed the half of the costs. The amount sued for, viz., 328*l.*, is made up as follows:—

	£	*s.*	*d.*	
Holt's fees as arbitrator	94	10	0	
McNay's fees as arbitrator	94	10	0	
Crampton's fees as umpire	63	0	0	or £139
Out of pocket expenses	76	0	0	
making in all the	£328	0	0	sued for.

It has been agreed that this amount is to be subject to taxation.

The question is whether the whole or part, and, if so, what part of these fees can be recovered in the present action, and if so, from whom?

On the part of the plaintiff, it was in the first place contended that by the appointment of Mr. Holt as arbitrator and Mr. Crampton as umpire, under the circumstances above narrated and apart from any special bargain, those gentlemen became entitled at law to recover their fees from the parties litigating, or, in other words, that there existed an implied joint undertaking by the parties litigating to pay the plaintiffs their fees, being reasonable remuneration for the services respectively rendered by them. In the second place, the plaintiffs contended that, even if this were not so, there was an express bargain in the present case and that upon the express bargain the action was maintainable.

Both these propositions were denied by the defendants. It was said that by the law of England, apart from express bargain, an arbitrator or umpire could maintain no action for remuneration for his services, for that there existed no implied promise by the parties appointing to pay, and that the only remedy the arbitrator or umpire had was a lien upon the award, or possibly by attachment. They also insisted that there was no express bargain or evidence of an express promise by the defendants to pay the plaintiffs their fees in the present case.

If I were not fettered by authority and were asked the simple

1887

CRAMPTON & HOLT v. RIDLEY & Co.

A. L. Smith, J.

question whether, upon a purely mercantile and business arbitration as this was, where men in the positions in which the arbitrators and umpire in this case were, were appointed, there was or was not an implied promise by the parties appointing jointly to pay them reasonable remuneration for their services, I should not have hesitated to answer the question in the affirmative. This is not the case of a dispute among friends upon social or such like matters asking mutual friends to settle the dispute between them, in which case I should agree that there was no implied undertaking to pay for the services to be rendered. Nor is it a case of counsel being retained to adjudicate. It is a purely business transaction of common daily occurrence, and which during the last half century has become more and more in practice as a well-known way of settling mercantile and business disputes, without having recourse to the Courts of law; in all which cases, and I have never in my experience known one to the contrary, except there may have been an express bargain on the subject, the arbitrators and umpire have universally looked for and been paid remuneration for their services rendered. In fact, such arbitrators and umpires, as is well-known, make the adjudicating upon such claims part of their daily and ordinary avocation, and in such cases, apart from authority, I should have held that there was the implied promise to pay insisted upon by the plaintiffs. It is said, however, that the cases have decided otherwise, and that I am bound thereby.

In the year 1801, in the case of *Virany* v. *Warne* (1), Lord Kenyon certainly ruled at nisi prius that the appointment of an arbitrator to settle a dispute which had arisen between partners was not of such a nature as to raise a demand for payment, and that the plaintiff could recover nothing unless he could prove an express promise.

In 1818, in *Swinford* v. *Byrne* (2), Dallas, C.J., would certainly seem to have thought that an arbitrator could demand what he called compensation for his trouble, but he said he would reserve the point.

In the year 1831, in *Burroughes* v. *Clarke* (3), Taunton, J., re-

(1) 4 Esp. 47. (2) Gow's N. P. 5.
(3) 1 Dowl. 48.

membering the case before Lord Kenyon of, I take it, *Virany* v. *Warne* (1), held upon that authority that an arbitrator could not sue for his fees, "the office, as ruled by Lord Kenyon, being altogether honorary" as he said.

In 1842 came the case of *Hoggins and Others* v. *Gordon*. (2) In this case an argument took place upon special demurrer as to whether the declaration was sufficient, it being an action by an umpire and two arbitrators to recover their fees from the parties litigant. The Court decided in the case that an express promise would be intended from the averments stated in the declaration and so gave judgment for the plaintiffs upon special demurrer. It was insisted by the defendants that there was a direct decision of the Court of Queen's Bench that without an express promise no action could be maintained. It should, however, be noticed in this case that Patteson, J., referred to the decision of Dallas, C.J. in *Swinford* v. *Byrne* (3) certainly without disapproval. Whether this is an authority binding upon me that in an arbitration such as the present no promise is to be implied to pay the arbitrators and umpire I do not stop to discuss for reasons hereinafter appearing. I wish, however, to point out that the last decision is nearly half a century ago, when arbitrations such as we are now considering were not in vogue, and had not become of every-day practice as in the last quarter of a century they have.

In 1851, however, Parke, B., in *In re Coombs* (4) (and this is the latest case upon the subject to which I have been referred), appears to have thought that an arbitrator might possibly sue for his fees without an express contract, for that learned judge there said "no doubt he has a lien upon the award for his services, or perhaps he might maintain an action for work or labour." The learned judge is not likely to have overlooked what was actually decided in *Hoggins* v *Gordon*. (2)

I should notice that the law of America is that such fees can be sued for. See Parsons on Contracts, 5th ed., vol ii., p. 55.

In my opinion if the point now in hand ever comes to be decided by a court of review, if that be necessary, it will be held, and I believe the law to be, that upon an arbitration such as we

(1) 4 Esp. 47.
(2) 3 Q. B. 466.
(3) Gow's N. P. 5.
(4) 4 Ex. 841.

1887

CRAMPTON & HOLT v. RIDLEY & CO.

A. L. Smith, J.

are now dealing with, there is an implied promise by the parties appointing the arbitrators and umpire jointly to pay them for their services. In my judgment in the cases above referred to Courts were not dealing with the class of arbitrators and umpires to which the case in hand applies.

But the plaintiffs did not rest their case upon an implied undertaking to pay, but insisted that in this case there was evidence from which I should infer an express promise to pay, and in my judgment the plaintiffs are right in their contention, and if this be so the express promise would obviously override any implied promise that might otherwise exist. It seems to me that when upon April 7, 1883, the arbitrators raised the point as to their fees, the parties then and there undertook not only to pay them the arbitrators but also the umpire to be appointed their and his fees as directed by the award to be made. By the contract of submission to arbitration of July 10, 1882, the parties to the litigation agreed inter se that the costs of the reference and award should be in the discretion of the arbitrators or umpire as the case might be, and, as was pointed out by Parke, B., in *Bates* v. *Townley* (1), although the submission is not a contract between the arbitrators and umpire on the one part and the parties litigating on the other, yet "the contract of the two parties is evidence by their own admission that the arbitrators were to be paid for their trouble, and might be used for that purpose if the arbitrators had to sue the parties for their services." This, coupled with the agreements of April 7, 1883, made directly with the arbitrators, both communicated as they were to Mr. Crampton before he acted, in my judgment is ample evidence of an express promise to pay as contended for by the plaintiffs, and I accordingly find such contract to have been made.

But then arises the question—express promise to pay what and by whom? Why, as stated in the agreements of April 7, 1883, as I read them, an express promise by the parties litigant to pay in such manner as may be directed by the award. The award determined that each party was to pay his own costs of reference and half costs of award. This means each party has to pay his own costs of counsel, solicitor, witnesses, and so forth, viz., the

(1) 2 Ex. at p. 165.

costs of his conduct of his case, and each party has to pay half costs of what I will call the Court, i.e., of umpire, arbitrators, and award, and no more. In my judgment the true reading of the award by which the parties to the litigation have bound themselves is that each party was to pay half costs of award, as above defined, and if either paid more he was to be entitled to get the excess so paid from the other party. When either party had paid his half costs of award, then in my judgment his liability ceased, and over and above such half neither umpire nor arbitrator had any claim against either litigant upon the contract. This in my judgment is the effect of the special bargain made by the parties to the litigation between themselves.

Mr. Crampton is therefore entitled to recover from the defendants, Messrs. Ridley & Co., upon the special contract half his costs, viz., half of 139*l.*, i.e., 69*l.* 10*s.*, and no more. He is also entitled to a declaration that he is entitled to prove against the estate of Winby for the other half of his charge, viz., 69*l.* 10*s.*, subject to any objection which may hereafter be made to such proof by the trustee.

Messrs. Ridley & Co. have, in my judgment, in good faith paid their half of the costs to McNay, and are not liable to pay any more.

Holt is entitled to prove against the estate of Winby for his costs, viz., 94*l.* 10*s.*, and has no claim against Messrs. Ridley & Co.

As to McNay why he ever was made a defendant has never been satisfactorily explained to me. I quite understand why he was made a plaintiff, but when he wished to take no part in the litigation or to claim at all why he should have been made a defendant I do not understand. Anyhow he was, but no relief was claimed against him in the statement of claim. He however need not have appeared at the trial at all.

I give judgment for the plaintiff Crampton for 69*l.* 10*s.* against Ridley & Co., with costs, together with a declaration of right of proof for 69*l.* 10*s.*, with costs against Winby's estate. I declare the plaintiff Holt is entitled to prove, subject to all just exceptions, for the amount of 94*l.* 10*s.*, with costs against the estate of Winby. I dismiss McNay from the suit, without costs on either

1887

CRAMPTON & HOLT v. RIDLEY & Co.

side. If either party desire to have these fees taxed they may do so.

Judgment for the plaintiffs accordingly.

Solicitors for plaintiffs: *Radcliffes, Cator, & Martineau.*

Solicitors for defendants Ridley & Co.: *Crossman, Crossman, & Prichard, for Philipson, Cooper, & Goodger, Newcastle-on-Tyne.*

Solicitors for defendant McNay: *Tahourdins & Hargreaves.*

H. D. W.

Oct. 28, 29.

LEWIS *v.* LEWIS.

County Court—Practice—Action in High Court—Claim exceeding 50*l.*—*Reduction by admitted Set-off—Order for Trial in County Court—County Courts Act,* 1856 (19 *&* 20 *Vict. c.* 108), *s.* 26.

Where in answer to a claim exceeding 50*l.* the defendant claims by way of set-off and counter-claim an amount which, if deducted from the amount of the plaintiff's claim, would leave a balance not exceeding 50*l.*, and the reply admits the defendant's claim, an order can be made, on the application of the plaintiff, under s. 26 of the County Courts Act, 1856, that the cause be tried in a county court.

APPEAL by the defendant from an order made by Pollock, B., under s. 26 of the County Courts Act, 1856 (1), on the application of the plaintiff, that the cause be tried in the County Court of Glamorganshire.

The claim indorsed on the writ was for 220*l.*, alleged to be due to the plaintiff as outgoing tenant of a farm. The defence denied liability, and alleged that the plaintiff owed the defendant 203*l.* for rent, which sum the defendant claimed by way of set-off and counter-claim. The reply admitted the defendant's claim.

Oct. 28. *H. F. Manisty,* for the defendant, in support of the appeal. There was no jurisdiction to make the order, for the case is not within s. 26 of the County Courts Act, 1856, which does not apply where the defendant not merely seeks to set off a debt,

(1) 19 & 20 Vict. c. 108, s. 26: "Where in any action of contract brought in a superior court the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds, a judge of a superior Court, on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name."

1887

LEWIS v. LEWIS.

but sets up a counter-claim. That section only applies where there are mutual debts within the meaning of the Statutes of Set-off (1), which is not the case here: *Grant* v. *Royal Exchange Assurance Co.* (2)

John Rose, for the plaintiff. The defendant claims a set-off of 203*l.*, which the plaintiff admits, thereby reducing his own claim of 220*l.* to 17*l.*, which brings the case within the precise words of the Act. The fact that the defendant also claims by way of counter-claim makes no difference. *Grant* v. *Royal Exchange Assurance Co.* (2) is not in point. The claim there was on a policy of insurance, which is a contract of indemnity.

H. F. Manisty, replied.

Oct. 29. MANISTY, J. In this case the claim of the plaintiff is for 220*l.*, and the defence alleges that the plaintiff owes the defendant 203*l.* The plaintiff by his reply admits that, and says that his claim is now for the difference between those two amounts, that is 17*l.* The question we have to decide is whether on that state of facts the action can be sent to the county court for trial; the plaintiff contends that it can, the defendant that it cannot. I am of opinion that my Brother Pollock was right. Putting it in that simple way, the difficulty is got rid of which would have arisen if there had been an application by the plaintiff to keep the action in the superior court. I think that the claim is reduced by 203*l.*, and that the case comes within the words and meaning of the section.

CHARLES, J. I am of the same opinion. The fact that there is here a counter-claim as well as a set-off is immaterial, for the case is provided for by s. 18 of the Judicature Act, 1884 (47 & 48 Vict. c. 61). I have no difficulty in upholding the order of my Brother Pollock.

Appeal dismissed.

Solicitors for plaintiff: *Schultz & Son, for G. & C. James, Merthyr Tydvil.*

Solicitors for defendant: *Cunliffes & Davenport, for R. W. Williams, Cardiff.*

(1) 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 5, repealed by 46 & 47 Vict. c. 49, s. 4.

(2) 5 M. & S. 439.

P. B. H.

1887
Nov. 19.

THE QUEEN *v.* FARRANT.

Justices—Disqualification—Interest—Bias—Advice given by Justice—Attempt to bring about Settlement—Justice summoned as Witness.

Any pecuniary interest in the subject-matter of the litigation, however slight, will disqualify a magistrate from taking part in the decision of a case.

If a magistrate has such a substantial interest, other than pecuniary, in the result of the hearing, as to make it likely that he will have a bias, he is disqualified.

The fact that a magistrate has been subpœnaed, and that it is intended to call him as a witness at the hearing, is not a legal disqualification, and the High Court will not on that ground prohibit the magistrate from sitting.

A magistrate, who was a surgeon, attended a patient professionally for injury caused by an assault. He endeavoured to induce his patient not to prosecute for the assault, and conveyed to him a message, sent by the person who had committed the assault, offering an apology and suggesting a settlement. A summons was issued for the assault, the magistrate was subpœnaed to give evidence for the prosecution, and a writ of prohibition was obtained to prohibit him from sitting at the hearing. The magistrate moved to set aside the prohibition:—

Held, that the acts of the magistrate did not shew that he had such a substantial interest in the result as to make it likely that he would have a bias, and that the fact of his being subpœnaed did not disqualify him from sitting, and therefore the prohibition must be set aside.

A RULE nisi had been obtained by Samuel Farrant, the Mayor of Taunton, to set aside an order of Kekewich, J., that a writ of prohibition should issue to prohibit Mr. Farrant from sitting to hear and determine the matter of a summons against Thomas Burch for assaulting Robert Mattock, and to supersede the writ of prohibition.

The following are the material facts appearing from the affidavits:—

On July 21, 1887, Thomas Burch assaulted Mattock and a person named Dyer at Taunton.

On July 22 Mr. Farrant, who was a surgeon practising at Taunton, and was the regular medical attendant of Mattock and Dyer, and on intimate terms with both of them, was sent for by Mattock, whom he attended on July 22, 23, and 25 for the injury caused by the assault.

On July 23 summonses for assault were taken out by Mattock and Dyer against Thomas Burch, and a charge of unlawfully wounding Mattock was subsequently preferred.

When attending Mattock Mr. Farrant had some conversation with him with regard to the assault. The affidavits differed as to the exact words used, but it appeared that Mr. Farrant had endeavoured to dissuade Mattock from taking proceedings, and had expressed a wish that the case might be arranged without going into court. He had also used similar expressions in conversation with Dyer with regard to Dyer's case.

On July 23 John Burch, a brother of Thomas Burch, asked Mr. Farrant to convey a message to Mattock stating his brother's regret for what had occurred, and suggesting a settlement of the case by an apology and payment of a sum of money to the Taunton hospital. Mr. Farrant delivered the message, but Mattock had then sent for a solicitor, and the offer was not accepted.

A man named Bradbeer, who stated that he had seen the assaults committed, alleged that Mr. Farrant had several times asked him how the matter was going on and if it was going to be settled, and that on one occasion Mr. Farrant stated that the complainants would not succeed before the justices, and offered to lay five to one that such would be the result.

According to Mr. Farrant's affidavit he had had a conversation with Bradbeer, in which they both expressed a wish that the case could be settled out of court, but he did not then know that Bradbeer had witnessed the assault, or was to be a witness. He denied that he had ever said that the complainants would not succeed, or had ever made or offered to make any bet as to either of the cases.

Mattock's solicitor stated in his affidavit that in his opinion it was absolutely necessary to call Mr. Farrant as a witness to prove the nature of Mattock's injuries.

Mr. Farrant had not attended Dyer for injury caused by the assault, but he was subpœnaed in both cases.

Wheeler, Q.C., and *Bartley Denniss*, for Mattock, shewed cause. There is no ground for setting aside the order for the prohibition. Whatever view the Court may take of the evidence, it is clear that Mr. Farrant has interested himself in the case, and made efforts to prevent its being brought into court, and it is unlikely that a person who has done this could sit and adjudicate

1887

THE QUEEN v. FARRANT.

upon the case with an unbiassed mind. If the story of the offer to bet is accepted, that alone is sufficient to disqualify him from sitting. Moreover it is apparent from the fact that he attended Mattock that he is a necessary and material witness.

Sir Henry James, Q.C., and *Blake Odgers*, in support of the rule. The charges made against Mr. Farrant are unfounded, and no interest can be imputed to him which can disqualify him from sitting. There is no suggestion of pecuniary interest, and there is nothing in the evidence to shew any bias. An attempt to persuade the parties to settle amicably does not prevent a magistrate from being in a position afterwards to adjudicate fairly on the case. It often happens that a judge tries to bring about a settlement, but it has never been suggested that the judge is unfit to try the case in consequence. If the expression as to laying five to one had been used it might have been doubtful whether it could be taken as a serious offer to bet on the case, but the whole statement is positively denied. To hold that the subpœna disqualifies the mayor from sitting would put it in the power of either party to a cause to disqualify any particular magistrate or judge by serving him with a subpœna.

The following authorities were referred to: *Hutton* v. *Fowke* (1); *Brookes* v. *Earl of Rivers* (2); *Anonymous* (3); *Wood* v. *Mayor of London* (4); *Home* v. *Earl Camden* (5); *Dimes* v. *Proprietors of Grand Junction Canal* (6); *Ex parte Medwin* (7); *Reg.* v. *Recorder of Cambridge* (8); *Reg.* v. *Alcock* (9); *Reg.* v. *Handsley* (10); *Reg.* v. *Justices of Great Yarmouth* (11); *Reg.* v. *Tooke.* (12)

STEPHEN, J. The legal principles on which the decision of this case turns are as follows. In the first place it is a leading principle of English law that no one is allowed to be a judge in his own case; that means that the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge. This rule has been carried very far, for

(1) 1 Keb. 648.
(2) Hardr. 503.
(3) 1 Salk. 396.
(4) 1 Salk. 397.
(5) 2 H. Bl. 533.
(6) 3 H. L. C. 759.
(7) 1 E. & B. 609.
(8) 8 E. & B. 637.
(9) 37 L. T. (N.S.) 829.
(10) 8 Q. B. D. 383.
(11) 8 Q. B. D. 525.
(12) 48 J. P. 661; 32 W. R. 753.

instance, in such cases as *Dimes* v. *Proprietors of the Grand Junction Canal* (1) and *Reg.* v. *Recorder of Cambridge* (2), where the rule is stated as strongly as possible. It has, however, no bearing on the present case, because no pecuniary interest can be shewn to exist here. But the law does not stop there, for there may be an interest which has substantially the same effect as a pecuniary interest, though it is not of the same nature. This is explained in the case of *Reg.* v. *Rand* (3), where Blackburn, J., delivering the judgment of the Court of Queen's Bench, said: "Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that, where there is a real bias of this sort, this Court would not interfere." (4) Again in *Reg.* v. *Meyer* (5), Blackburn, J., said: "In *Reg.* v. *Rand* (3) we held that there was no ground for quashing the certificate of the justices. The effect of our judgment in that case was that, though pecuniary interest in the subject-matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not ipso facto avoid the justices' decision; and we thought that, though there was a possibility of bias in that case, yet it was not real. But we expressly excepted a real bias, saying 'that we must not be understood to say, that where there is a real bias, this Court would not interfere.' In the present case there is such a real bias." (6) The same principle is further illustrated by the case of *Reg.* v. *Handsley* (7), where Cave, J., delivering the judgment of the Court, said: "In order to disqualify the justice it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter." (8) We adopt the rule of law laid down in these cases.

The question here is whether Mr. Farrant had such a substantial interest, other than pecuniary, as to make it likely that he would have a real bias. The substance of the matter is this: shortly after the assault was committed Mr. Farrant was

(1) 3 H. L. C. 759.
(2) 8 E. & B. 637.
(3) Law Rep. 1 Q. B. 230.
(4) Law Rep. 1 Q. B. 232, 233.
(5) 1 Q. B. D. 173.
(6) 1 Q. B. D. 177.
(7) 8 Q. B. D. 383.
(8) 8 Q. B. D. 387.

1887

THE QUEEN v. FARRANT.

Stephen, J.

called in to attend the man who had been assaulted, and he then advised him not to take the case into court, giving that advice as a friend; afterwards he conveyed a message from the brother of Burch, the person who committed the assault, to the complainant, Mattock, expressing a desire that the case might be settled; by that time, however, a solicitor had been instructed, and the complainant refused to accept the suggestion as to a settlement. That is the substance of what Mr. Farrant did, and the question is whether there is anything to shew that he would not do justice if he were to sit at the hearing of the case. I have given careful attention to the question, and I cannot see anything of the kind. We cannot say that he is likely to have a bias merely because he suggested a settlement, and advised the complainant not to go into a criminal court. Then it is said that he is to be a witness at the hearing before the magistrates. That may be a ground on which he may decide not to sit, but this is a matter for him to consider, not for us. It might cause great mischief if we were to hold as a matter of law that, because a magistrate or a judge is likely to be called as a witness, he is bound not to sit. Such a doctrine might cause great inconvenience, as, for instance, if a judge of assize were subpœnaed just before the trial, the effect might be to necessitate a postponement to the next assizes, and it would be in the power of either party, by serving a subpœna, to prevent any particular judge or magistrate from sitting. It would be a serious thing to lay down a rule which might have such an application. We have come to the conclusion that there is nothing in Mr. Farrant's conduct in relation to the matters to which I have referred that can have the effect of disqualifying him from sitting. But there is another circumstance alleged. It is said that he offered to make a bet as to the result of the hearing before the magistrates. If he had in fact made a bet, he would be disqualified by pecuniary interest, and if he had seriously offered to make such a bet, that would be a very wrong act on the part of a magistrate who intended to adjudicate upon the case. But Mr. Farrant absolutely denies the statement, and it is not proved to our satisfaction that the transaction ever took place.

For these reasons our conclusion on the whole facts of the case is that the writ of supersedeas must issue and the prohibition be,

set aside. Mr. Farrant's right to sit is legally recognised, and the rule will be made absolute with costs.

1887

THE QUEEN v. FARRANT.

CHARLES, J. I am of the same opinion, both on the law and on the facts.

Rule absolute.

Solicitors for the applicant for the prohibition: *Stevens & Co., for J. Crawshaw, Taunton.*

Solicitor for Mr. Farrant: *R. H. Willcocks, for S. B. Cresswell, Taunton.*

P. B. H.

[IN THE COURT OF APPEAL.]

Nov. 10.

BONELLA, APPELLANT; TWICKENHAM LOCAL BOARD OF HEALTH, RESPONDENTS.

HOLMES, APPELLANT; TWICKENHAM LOCAL BOARD OF HEALTH, RESPONDENTS.

Local Government Acts—Sewers—Vesting in Local Authority—Sewer not made for Person's own Profit—Private Street, Sewer in—Frontagers not liable for Expenses of New Sewer where Authority once satisfied with Old Sewer —Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 18, 150, 207.

A street having been laid out by the owners of a building estate, a sewer was made by them for the drainage of the houses in the street. Subsequently, in the year 1868, a local board was formed whose district included such street. The sewer, which discharged into the Thames, was sufficient for the purposes of the drainage of the street, assuming that draining into the Thames could be continued. In 1884 the local board, having received notice from the Thames Conservators to discontinue the discharge of sewage into the Thames, gave notice under s. 150 of the Public Health Act, 1875, to the frontagers in the street to make a new sewer, and on their default themselves constructed such sewer and sought to charge the expenses upon the frontagers:—

Held (affirming the decision of the Queen's Bench Division), that the original sewer was not a sewer made by the owners for their own profit and therefore had vested in the board under the Public Health Act; that, the board, not having taken any steps to compel the frontagers to sewer the street within a reasonable time after the sewer became vested in them, must be taken to have been satisfied with the sewer, and could not afterwards proceed against the frontagers under s. 150, but were bound themselves to keep the sewer in repair under s. 15 of the Public Health Act, 1875, and, if it became necessary, to enlarge or alter it under s. 18; and that consequently the expenses of constructing the new sewer were chargeable not on the frontagers but on the general district rate.

APPEALS from the judgment of the Queen's Bench Division

1887

BONELLA v. TWICKENHAM LOCAL BOARD OF HEALTH.

HOLMES v. TWICKENHAM LOCAL BOARD OF HEALTH.

(Huddleston, B., and A. L. Smith, J.) (18 Q. B. D. 577), upon cases stated by justices.

The facts, which are fully set out in the report of the case in the Court below, were briefly these.

The respondents were the urban sanitary authority for the district of Twickenham. The appellants were the respective owners of two pieces of land abutting on a street within the said district. The street and land abutting thereon had formerly belonged to a company called the Conservative Land Society. The society, prior to 1868, in which year the respondents' board was formed, being the owners of a building estate, laid out the street in question and formed a sewer for the drainage of the houses in the street. This sewer, which discharged into the River Thames, was sufficient for the drainage of the street, assuming that draining into the Thames could be continued.

In 1884, the respondents, being under notice from the Thames Conservators to discontinue the discharge of sewage into the Thames, gave notice to the frontagers in the street under s. 150 of the Public Health Act, 1875, to make a new sewer, which was to be a tributary to the respondents' general system of sewerage, in an exactly opposite gradient to the old sewer, falling to certain outfall works of the respondents. The frontagers making default in the construction of such sewer, the respondents constructed it themselves, and sought to recover by summary proceedings from the appellants the proportions of the expenses apportioned to them respectively. The magistrates made orders for the payment by the appellants of the amounts claimed, but the Queen's Bench Division quashed such orders.

The respondents appealed.

Lumley Smith, Q.C., and *J. P. Grain*, for the respondents. It is contended that the case is within the provisions of s. 150 of the Public Health Act, 1875. By the terms of that section, if at any time a private street, i.e. a street not being a highway repairable by the inhabitants at large, is not sewered to the satisfaction of the authority, they may take proceedings under the section to compel the frontagers to sewer it. This sewer did not vest in the respondents, being a sewer made for private profit

and so within the exception in s. 13. It was made by the company to develop their own estate.

[FRY, L.J. Most sewers are so made; so that, if that view were correct, the exception would almost eat up the rule.]

Assuming that the sewer had vested in the authority, that fact would not render the terms of the section inapplicable, provided the street continued to be a private street, i.e. not repairable by the inhabitants at large. There is no limit in the terms of the section with regard to the period at which the authority may be dissatisfied with the sewerage of the street. Even if an authority were once satisfied with the existing sewerage of a street, new circumstances may arise rendering the existing sewer no longer satisfactory to them. There is no ground here, however, for assuming that the respondents ever were satisfied with this sewer.

[FRY, L.J. Is it not their duty under the Act to see that the sewers within their district vested in them are sufficient and satisfactory? Must they not be taken to have performed that duty with regard to this sewer after it vested in them? From 1868 to 1884 they evinced no dissatisfaction with this sewer.]

It was sufficient for the street as long as the outfall into the Thames was allowed. Assuming that they were satisfied with it once, now that the outfall is no longer available, circumstances have arisen under which they are dissatisfied with it, and the provisions of s. 150 apply.

[LORD ESHER, M.R. On that construction of the Act it would seem that, if a local board at any time thought it desirable with regard to the general requirements of the district to alter their system of sewerage, they might order the frontagers in a private street to construct a new sewer in relation to such general requirements, although the existing sewer was quite sufficient for the purposes of the street.]

It may be that the dissatisfaction must have relation to the requirements of the street.

Bosanquet, Q.C., *Edwyn Jones*, and *A. Powell*, for the appellants, were stopped. They cited *Fulham Board* v. *Goodwin*. (1)

(1) 1 Ex. D. 400.

1887

BONELLA v. TWICKENHAM LOCAL BOARD OF HEALTH.

HOLMES v. TWICKENHAM LOCAL BOARD OF HEALTH.

LORD ESHER, M.R. In this case, when the local board was constituted and the provisions of the Public Health Act applicable to sewers came into operation in their district, there was a sewer under this street for the purpose of draining the houses in it, which had been made by the company mentioned in the case. We are of opinion that that sewer did not come within the exception in s. 43 of the Public Health Act, 1848, or that in s. 13 of the present Act, not being a sewer made by any person for his own profit or any company for the profit of their shareholders. That being so, it was a sewer which, when the local board came into existence and the provisions of the Public Health Acts became applicable, vested in the local board. The moment it so vested it was, as it appears to me, their duty to see whether that sewer was sufficient for the drainage of the street for the purposes of which it was then used. If they were not satisfied with it, they would, I think, at that time have had power to deal with it under the provisions of the Public Health Act, 1848, now re-enacted by s. 150 of the Public Health Act, 1875. It being their duty then to consider whether it was sufficient or not, they would be entitled I think to a reasonable time within which to make up their minds whether it was so, and whether they should act under those provisions. But, if after the lapse of a reasonable time they have done nothing and expressed no view on the subject, I think that must be taken, for the purpose of the application of these sections, to be conclusive as a matter of fact that at that time they were satisfied with the sewer for the purposes for which it was then used. When once they are so satisfied, I think they can no longer bring into play the provisions of s. 150. In my opinion the provisions of the section with regard to the sewerage of the street by the frontagers can only be brought into play within the reasonable time during which the board are entitled to say that they are dissatisfied with the existing sewer. If they were no longer able to have recourse to the provisions of that section, what would be their duty with regard to the sewer? The sewer being vested in them, they would be bound to keep it in repair under s. 15 of the Public Health Act, 1875, for the purposes for which it existed, and, if at any time they came to the conclusion that it was not sufficient,

they would be entitled under s. 18 to enlarge it, or alter the course of it, or close it. If the circumstances arose under which they would be entitled to do so under s. 18, then I think it would be their duty to do so under that section. In that case by the provisions of s. 207 the expenses of performing such duty would be payable out of the general district rate and not by the frontagers. That seems to me to be the true construction of these enactments, and I think it is the construction put upon them in the Court below, with whose decision we agree. In thus deciding it appears to me that we are following the same line of reasoning as that applied by the Exchequer Division in the case of *Fulham Board* v. *Goodwin*. (1) That decision is not strictly in point because it is upon another statute, but it seems to me that a similar line of reasoning to that applied in that case is applicable to the present statute, because it is the only one by which the provisions of the statute can be made reasonable. Any other construction would I think make the provisions of the statute so oppressive that it is impossible to suppose that the legislature intended any such thing. For these reasons I think the judgment of the Court below was right, and should be affirmed.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Spaull; Miller, Smith, & Bell.*
Solicitors for respondents: *Ruston, Clark, & Ruston.*

(1) 1 Ex. D. 400.

E. L.

1887
Nov. 7.

[IN THE COURT OF APPEAL.]

IN RE JOHNSON.

Practice—Contempt of Court—Judge at Chambers—Abuse and Threatening Gestures used towards Solicitor after Hearing of Application at Chambers—Interference with Course of Justice.

A solicitor, who had attended the hearing of an application before a judge at chambers in the Royal Courts of Justice, immediately after such hearing and while the parties were on their way from the judge's room to the entrance gate of the building, made use of grossly abusive expressions and threatening gestures to the solicitor on the other side in relation to such application.

Held, that such conduct in relation to proceedings before a judge at chambers was a contempt of Court punishable by attachment.

Ex parte Wilton (1 Dowl. N.S. 805) discussed.

APPEAL from the order of Kekewich, J., sitting as Vacation Judge, for the committal of the appellant for contempt of Court.

The facts as stated in the affidavits upon which the order for committal was obtained appeared to be in substance as follows.

The occasion of the alleged contempt was an application to Kekewich, J., sitting as vacation judge at chambers, with reference to a stay of proceedings upon an order made by a county court judge, in an action in the county court, against one Harris, one of the defendants in the action.

Upon the hearing of the application, which took place at the judges' chambers attached to the Queen's Bench Division in the Royal Courts of Justice, and which was attended by the solicitor for the plaintiff in the county court action and the appellant, who was the solicitor for Harris, the learned judge made an endorsement upon the notice of the application, and handed it to the appellant. The appellant refusing to shew such endorsement to the solicitor for the plaintiff, the latter applied to the learned judge, who directed the appellant to produce the endorsement to him. While he was copying the endorsement, the appellant snatched it away from him. He thereupon again applied to the judge, who rebuked the appellant and gave the plaintiff's solicitor a similar endorsement on a separate piece of paper. Upon the plaintiff's solicitor leaving the judge's room, and while he was in the lobby outside, the appellant assailed him with foul and

offensive names. While the plaintiff's solicitor was going down the stairs and along the passages on his way to the exit from the building, the appellant continued to abuse him, calling him "a d——d perjured scoundrel." On arriving at the exit door the plaintiff's solicitor applied for protection to some constables who were standing there, upon which the appellant assailed him with further abuse, repeating the epithets before mentioned and several times put his hands near the plaintiff's solicitor's face in a threatening attitude. Upon being requested to put them down, he continued to put them up the more. The plaintiff's solicitor stated in his affidavit that it would be necessary for him to attend further appointments in the course of pending litigation between his and the appellant's clients, and that in consequence of the appellant's conduct and threatening language he could never attend an appointment without anticipating an assault upon him by the appellant. Upon an application made on behalf of the plaintiff and the plaintiff's solicitor to Kekewich, J., sitting as Vacation Judge in court, for the committal of the appellant, the learned judge made the order appealed against. The order was to the effect that it appearing by the evidence that the appellant did within the precincts of the court threaten, assault, and intimidate the plaintiff's solicitor, and the Court being of opinion upon consideration of the facts disclosed by the evidence that the appellant had been guilty of a contempt of the Court, it was ordered that the appellant be committed to prison for his contempt. (1)

Oswald, and *F. Watt*, for the appellant. There was no contempt of Court in this case. The alleged misconduct for which the appellant was committed did not take place either in the room in which the judge was sitting or in what could fairly be called the precincts thereof. There was therefore no personal insult to the judge, nor is it shewn that there was any inter-

(1) For the purposes of the appeal the appellant made an affidavit denying that he had been guilty of any rudeness before the judge, and stating that he did not use any violence to the plaintiff's solicitor, or intimidate him; he also stated that on the occasion of the alleged contempt he was suffering in mind and body from personal trouble and was very excited, and that he regretted losing his temper and having used the language he did.

1887

IN RE JOHNSON.

ference with the course of justice; all that it amounts to is that there was some unseemly abuse by one solicitor of the other after the parties had left the judge's chambers. A great number of rooms and offices used in connection with the administration of justice have been brought together under the same roof with the courts, and the whole building is called the Royal Courts of Justice; but it does not follow that the whole of the rest of the building is therefore constituted the precincts of a particular court. It is just the same as if the appellant meeting the plaintiff's solicitor on a subsequent occasion in one of the refreshment rooms or in the street outside the building had abused him in reference to the application, which surely would be no contempt of the Court. It is contended that a judge at chambers has no power to commit for contempt. He can have a person removed from his chambers who is guilty of improper behaviour, but he does not constitute a Court when sitting at chambers, and therefore, even assuming that there was misconduct towards him, it does not constitute a contempt of Court. In *Rex* v. *Faulkner* (1) Lord Abinger, C.B., says: "A judge of a Court of Record very often is engaged in the performance of functions which are wholly unconnected with his power of committing: a judge of the Court of King's Bench who grants a warrant at chambers is protected, although he should mistake his jurisdiction, but no one would think that because he might grant a warrant on an information laid before him he could in his private capacity, as a judge of a Court of Record, punish any man for a contempt by fining him."

[BOWEN, L.J. The question whether a judge at chambers could commit for contempt is quite distinct from the question whether the Court could commit for contempt in relation to proceedings before a judge at chambers. The learned judge here did not commit the appellant as a judge sitting at chambers.]

In *Ex parte Wilton* (2) Coleridge, J., held that a person could not be attached for contempt under circumstances substantially identical with those in the present case, except that there the alleged misconduct took place after proceedings before the master.

[LORD ESHER, M.R. I do not understand that the judgment

(1) 2 C. M. & R. 525, at p. 533. (2) 1 Dowl. N.S. 805.

in that case proceeded so much on the footing that the Court had no jurisdiction to grant the attachment as that, as a matter of discretion, the learned judge thought that the case was not one for its exercise.]

They also cited *Republic of Costa Rica* v. *Erlanger*. (1)

Johnston Watson, for the respondents, was not called upon.

LORD ESHER, M.R. The facts of this case are very simple. A learned judge was sitting at chambers, and came to a certain conclusion with regard to a matter before him, whereupon the appellant, the solicitor for one of the parties who attended the summons, began to misconduct himself in the room where the judge was sitting. Of that misconduct, however, I will take no further notice. Immediately after the parties left the judge's room—it seems to me immaterial to consider how near to the door of such room, or in what part of the building it took place—the appellant began to conduct himself disgracefully, and continued such conduct till the parties reached the door of the building. This disgraceful conduct consisted in using violent language of the lowest description to the solicitor opposed to him, for the purpose of insulting such solicitor with reference to the decision just given by the judge at chambers, and the proceedings which had just taken place before such judge. It seems to me that such conduct was, and was intended to be, an insult to the administration of justice. Upon these facts certain arguments have been laid before us on the appellant's behalf with which we must deal. The main argument appears to come to this, that there was no contempt in court; but it does not follow that there was no contempt of Court. The same fallacy seems to underlie all the argument. It was said that a judge sitting in chambers was not sitting in court, and that, even if he received a blow in the room in which he was so sitting, that would not be a contempt of Court, because it would not be a contempt of him in court. It is not necessary to constitute a contempt of Court that the contempt should be in court, or that it should be a contempt of a judge sitting in court. All that is necessary is that it should be a contemptuous interference with judicial proceedings in which the judge is acting as a

(1) 46 L. J. (Ch.) 375.

1887

IN RE JOHNSON.

Lord Esher, M.R.

judicial officer. This proposition is laid down in terms in a learned judgment prepared by Wilmot, C.J., which, though never delivered in court owing to the proceedings in the case having dropped, contains nevertheless a most valuable exposition of the law on the subject. I refer to the judgment which he had prepared for delivery in the case of *Rex* v. *Almon*. (1) He there says: "The question resolves itself at last into this single point, whether a judge making an order at his house or chambers is not acting in his judicial capacity as a judge of this Court, and both his person and character under the same protection as if he was sitting by himself in court? It is conceded that an act of violence upon his person when he was making such an order would be a contempt punishable by attachment. Upon what principle? For striking a judge in walking along the streets would not be a contempt of Court. The reason, therefore, must be that he is in the exercise of his office and discharging the function of a judge of this Court; and, if his person is under this protection, why should not his character be under the same protection?" The Chief Justice was there speaking of contemptuous conduct directed towards the person or character of a judge so acting in a judicial capacity, but the same principle applies, as it seems to me, to contemptuous conduct and expressions in relation to his proceedings in the course of the administration of justice. If he is acting judicially in the office of a judge, he is acting as a judge of the High Court of Justice. It signifies not where he is sitting, or what he is doing in such judicial capacity. If any one attempts to interfere improperly with such judicial proceeding, provided it is done with sufficient nearness, it is a contempt; a contempt not of the judge, but of the High Court as a judge of which he is acting. Fry, L.J., has called my attention to the fact that Lord Lyndhurst, L.C., in *Ex parte Van Sandau* (2), appears to have approved of the principle laid down by Wilmot, C.J. I have stated the principle as applicable to a judge exercising his judicial functions, but I do not mean to say that it is confined to a judge. I think it would be equally applicable to a master of the Court exercising

(1) Wilmot's Notes of opinions and judgments, 243, 265.
(2) 1 Ph. 445.

judicial functions. If any one were to act as the appellant did in the case of a master sitting at chambers, I think he would be guilty of a contempt, a contempt not of the master but of the Court. I cannot help thinking that this was really recognised as the law by Coleridge, J., in the case of *Ex parte Wilton*. (1) In that case no doubt he declined to issue an attachment, but he recognised, I think, that he had jurisdiction to do so; and I must respectfully say that, if I had been sitting in his place, in that case I should have directed an attachment to issue. It may possibly be that I have too much restricted the doctrine on the subject by suggesting that there would be a limit of time or space with regard to the question whether such conduct amounted to a contempt. It may be that there would be no such limit of time or space, provided the acts done or expressions used could be considered an interference with the course of justice. Distance in point of time or space, however, would, I think, at any rate be a matter to be taken into consideration in determining whether there had been an interference with the course of justice. It is not, however, necessary to consider whether there would be any such limitation here. I pass by altogether the question where and in what part of the building the appellant's misconduct took place; it is obvious that it took place immediately after proceedings before a judge in chambers, and in consequence of what had taken place upon those proceedings, and that the appellant intended in what he did to cast contumely and insult on such proceedings. It seems to me to be immaterial whether the judge sitting at chambers is to be considered as sitting in a court or not. I am not prepared to say he is not, but it is not necessary to consider the point. The judge was acting for the Court judicially and in the administration of justice, and what the appellant did was an insult to the administration of justice. That being so he was liable to be called to account for it, as he was, not before the judge sitting at chambers but before the Court. I do not say that a judge at chambers could for an act of contempt perpetrated before him at chambers himself commit for contempt. I do not decide whether he could or not, though I am inclined to think

(1) 1 Dowl. N.S. 805.

1887

IN RE JOHNSON.

Lord Esher, M.R.

that he could not. It seems to me quite clear that a person behaving in such a manner as the appellant did, either before the judge or immediately after leaving his chambers, with the intention of casting contempt on the administration of justice, is guilty of a contempt of the Court which is being represented by the judge and can be attached for contempt by such Court. For these reasons I think that the order of the learned judge was rightly made, and that this appeal should be dismissed.

BOWEN, L.J. I am of the same opinion. What is the principle which we have here to apply? It seems to me to be this. The law has armed the High Court of Justice with the power and imposed on it the duty of preventing brevi manu and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground, and not on any exaggerated notion of the dignity of individuals that insults to judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed. The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice. The question is, whether the conduct of the appellant in this case is an infringement of that principle. The facts are these. A judge at chambers hears and determines an application in which the appellant's client is concerned. Thereupon, on the staircase outside, and until he comes to the gates of the building, and therefore clearly within the precincts of the court, the appellant insults in the most grievous way and all but physically assaults the professional gentleman on the other side. Is not such conduct a gross interference with the course of justice? It seems to me that it is. To procure immunity from the consequences of such conduct for his client, the counsel for the appellant has addressed to us certain arguments which, when considered, really seem to be irrelevant. He has discussed the question whether this was a contempt committed in the face of a Court. It seems to me immaterial whether it was so or not, provided it was an interference with the administration of justice. Again, he endeavoured to

divert the discussion to the question whether a judge at chambers had power to commit for contempt. In this case the appellant was committed by the judge not sitting as a judge at chambers, but sitting in court, though no doubt the committal related to what had taken place with reference to the application at chambers. The true basis of our decision and the power of the Court to interfere in a summary way is, as the Master of the Rolls has pointed out, laid down by Wilmot, C.J., in the judgment to which reference has been made, and which has since been approved by Lord Lyndhurst in *Ex parte Van Sandau.* (1) I think it is important to observe that this protection afforded by the law extends to other officers besides judges acting under the authority of the Court as representing the Court. The case of *Ex parte Wilton* (2) seems to me to shew that the Court has equal jurisdiction to protect witnesses or officers of the Court such as masters employed in a judicial capacity. The moment the true basis of the jurisdiction to commit for contempt is arrived at, it appears plainly to be beyond the reach of the utmost ingenuity to argue that this case does not come within it.

FRY, L.J., concurred.

Appeal dismissed.

Solicitor for appellant: *J. Grove.*

Solicitors for respondents: *C. Robinson & Co.*

(1) 1 Ph. 445.

(2) 1 Dowl. N.S. 805.

E. L.

1887
Nov. 15.

PAPE *v.* PAPE.

Husband and Wife—Married Woman—"Desertion"—Order for support by Husband—Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 *Vict. c.* 52), *s.* 1.

By the Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), s. 1, any married woman who has been "deserted" by her husband may summon him before justices, and the justices "if satisfied that the husband, being able wholly or in part to maintain his wife and family, has wilfully neglected or refused so to do and has deserted his wife," may order that he shall pay her a weekly sum for her support.

Upon a summons by a married woman under the Act it appeared that disputes had arisen between her and her husband and that they had lived apart under an agreement for separation, by which he undertook to pay her a weekly allowance so long as she should live chastely and should not molest him. He had ceased to make and refused to continue the weekly payments under the agreement. He charged his wife with adultery, but the justices found that the charge was not proved:—

Held, that the refusal of the husband to pay his wife the weekly allowance and to carry out the agreement of separation was not sufficient evidence of "desertion" within the Act to warrant the justices in making an order against him for her support.

CASE stated under 20 & 21 Vict. c. 43.

The appellant, W. Pape, having appeared before the justices in petty sessions at Middlesborough upon a summons under the Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52) s. (1), charging him with having "wilfully refused and neglected to maintain" and "deserted" Mary Pape, his wife (the respondent), within the meaning of the Act, the

(1) Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), s. 1: "It shall be lawful for any married woman, who shall have been deserted by her husband, to summon her husband before any two justices in petty sessions or any stipendiary magistrate, and thereupon such justices or magistrates, if satisfied that the husband, being able wholly or in part to maintain his wife and family, has wilfully refused or neglected so to do and has deserted his wife, may order:—

"1. That the husband shall pay to his wife such weekly sum not exceeding two pounds as the justices or magistrate may consider to be in accordance with his means, and with any means the wife may have for her support and the support of her family, &c."

"2. Provided always, that no order for payment of any such sum by the husband shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned."

justices made an order for the payment by him of a weekly sum towards her support.

It appeared that at the date mentioned in the summons the appellant and respondent were not living together as man and wife. They had ceased to cohabit since June, 1886. In September, 1886, they signed an agreement for separation, by which the respondent was henceforth to live separate and apart from the appellant, as if she were a feme sole, and neither party was to molest or annoy the other, or require or attempt to compel each other to live together or cohabit, or take any proceedings for the restitution of conjugal rights, and the appellant agreed to pay an allowance of six shillings a week to the respondent so long as she should live chastely and should not molest or annoy the appellant.

Up to the middle of March the appellant duly paid the respondent the weekly allowance pursuant to the agreement. He then discontinued it, alleging molestation on her part. This the respondent did not deny, but excused herself on the ground of the appellant having refused to pay the weekly allowance. The appellant also charged the respondent with adultery, and on this ground, as well as that of molestation, refused any longer to support the respondent. The charge of adultery was denied by the respondent, and the justices were of opinion that it was not proved.

Under these circumstances it was contended on behalf of the appellant that as the parties were living apart under an agreement for separation the appellant had not "deserted" the respondent within the meaning of 49 & 50 Vict. c. 52, s. 1, and the Court had no jurisdiction to make the order claimed. The justices held that the conduct of the appellant in putting an end to the agreement and refusing to continue the allowance to the respondent constituted "desertion" within the meaning of the Act, and made the order. The question for the opinion of the Court was whether they were right in making such order.

McClymont, for the appellant. The order is invalid. The appellant has not "deserted" the respondent within the meaning of the Act. At the date of the alleged desertion the husband

1887

PAPE v. PAPE.

and wife were living apart under an agreement for separation. Cohabitation having ceased by mutual consent it was impossible for the appellant to "desert" the respondent. The Courts have considered "desertion" as regards, first, the settlement of paupers under 24 & 25 Vict. c. 55, s. 3, where the question is whether a married woman has been so deserted as to acquire a settlement in the place where she resides apart from her husband; and, secondly, the matrimonial offence of desertion under 20 & 21 Vict. c. 85, ss. 16, 27, 31. In *Reg.* v. *Cookham Union* (1) the wife whose removal to her husband's settlement was claimed had left the common home of her own free will, and it was held on that ground that there had been no desertion. In *Thompson* v. *Thompson* (2) the Judge Ordinary said, "Without attempting to define desertion in all possible cases, I think it clear that to constitute desertion by the husband, it must be shewn that he has wilfully absented himself from his wife and against her wish, she not being a consenting party." In *Fitzgerald* v. *Fitzgerald* (3) the Judge Ordinary said: "No one can desert who does not actively and wilfully bring to an end an existing state of cohabitation. If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, "desertion" in my judgment becomes from that moment impossible to either, at least until their common life and home have been resumed." It is clear that for the purposes of these Acts a refusal to carry out the terms on which cohabitation has ceased would not be held to constitute desertion. The application is here made in order to enforce payment by the husband of the consideration for an agreement for separation. The justices have no power to make an order for alimony in pursuance of such an agreement under an Act the sole object of which is to grant a new remedy to women who have really been deserted by their husbands.

No counsel appeared for the respondent.

STEPHEN, J. I am of opinion that the argument for the appellant is well founded. I base my opinion on the ground that

(1) 9 Q. B. D. 522. (2) 1 Sw. & Tr. 231; 27 L. J. (P. & M.) 65.
(3) L. R. 1 P. & D. 694, at p. 698.

1887

PAPE v. PAPE.

there has been no desertion. It is not necessary to give a definition of desertion. Desertion at any rate implies that the parties are living together at the time when the desertion takes place. Here they were living apart under an agreement to separate. The complaint of the respondent is really that the appellant has left off paying the money which was the consideration for the separation. The statute facilitates provision for women who have been deserted by their husbands. The respondent has not been deserted by her husband, and has no remedy under the statute. Whatever rights the parties had, apart from the statute, when the application under the statute was made, they have still. The order must be quashed.

A. L. SMITH, J., concurred.

Order quashed.

Solicitors for appellant: *Belfrage & Co., for Bainbridge & Barnley, Middlesborough.*

H. D. W.

[IN THE COURT OF APPEAL.]

Nov. 23, 24.

HAMMOND & CO. *v.* BUSSEY.

Damages, Measure of—Sale of Goods—Breach of Warranty—Sub-sale with similar Warranty—Costs of Action by Sub-vendee against the Purchaser reasonably defended.

The defendant contracted for the sale of coal of a particular description to the plaintiffs, knowing that they were buying such coal for the purpose of reselling it as coal of the same description. The plaintiffs did so resell the coal. The coal delivered by the defendant to the plaintiffs under the contract and by them delivered to their sub-vendees did not answer such description, but this could not be ascertained by inspection of the coal, and only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against the plaintiffs. The plaintiffs gave notice of the action to the defendant, who, however, repudiated all liability, insisting that the coal was according to contract. The plaintiffs defended the action against them, but at the trial the verdict was that the coal was not according to contract, and the sub-vendees accordingly recovered damages from the plaintiffs. The plaintiffs thereupon sued the defendant for breach of contract, claiming as damages the amount of the damages recovered from them in the action by their sub-vendees, and the costs which had been incurred in such action. The defendant paid the amount of the damages in the previous action into court, but denied his liability in respect of the costs:—

Held, that, the defence of the previous action being, under the circumstances,

1887

HAMMOND & Co. v. BUSSEY.

reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable, under the rule in *Hadley* v. *Baxendale* (9 Ex. 341), as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it.

Baxendale v. *London, Chatham, and Dover Ry. Co.* (Law Rep. 10 Ex. 35) discussed and distinguished.

APPEAL from the judgment of Field, J., at the trial.

The action was for breach of warranty on a contract to supply coal, the terms of which in substance imported that the coal was to be steam-coal reasonably fit to be used for the purposes of steamships. The plaintiffs claimed by way of damages the amount of damages which had been recovered from them in an action by sub-vendees of the coal supplied under the contract, the contract by them with their sub-vendees being for the supply of coal of a similar description to that mentioned in the contract between the plaintiffs and the defendant; and the plaintiffs also claimed by way of damages the costs incurred by them in defending such action. The defendant paid into court sufficient to satisfy the damages recovered from the plaintiffs by their sub-vendees, but denied his liability in respect of the claim made for costs.

The facts at the trial appeared to be as follows:—The defendant was a coal merchant, and the plaintiffs were shipping agents at Dover. It was known to the defendant to be part of the plaintiffs' business to supply coal to steamships calling there. The plaintiffs contracted with the defendant for the supply to them of a quantity of "steam-coal" for the purpose of being used on steamships, the defendant knowing at the time when the contract was made that the plaintiffs were buying the coal for the purpose of reselling the same as steam-coal fit for use in steamships. The plaintiffs entered into a contract for the sale of coal to the owners of steamships under substantially the same description as that by which the coal was sold to them. The coal delivered by the defendant to the plaintiffs under the contract and by them delivered to their sub-vendees was not reasonably fit for use as steam-coal for the purposes of steamships, but it appeared that this defect in quality could not be ascertained by inspection of the coal, and would only become apparent when the coal was used on board ship. A claim being made against

1887

HAMMOND & Co. v. BUSSEY.

the plaintiffs by their sub-vendees in respect of the bad quality of the coal, the plaintiffs wrote to the defendant informing him of such claim, and requested him to supply them with certificates from the mineowners, from whom he had procured the coal, certifying what the coal really was. The defendant did forward to the plaintiffs a certificate from the mineowners in South Wales that the coal was of the description specified in the contract, and various certificates from persons to whom similar coal had been supplied that it was of good quality and got up steam very well. Before the trial of the action by the sub-vendees against the plaintiffs, the plaintiffs' solicitors wrote to the defendant, proposing that he should co-operate in the defence and agree to be bound by the verdict and damages, if any. The answer of the defendant was in substance, that he declined to interfere in the matter, as he utterly repudiated any liability to the plaintiffs, he having duly carried out his contract with them.

At the trial of the action by the sub-vendees against the plaintiffs, the jury found that the coal was not reasonably fit for use as steam-coal on board steamships, and judgment for damages was thereupon given against the present plaintiffs, with costs. The learned judge was of opinion, that under the circumstances the plaintiffs acted reasonably in defending the action against them and going to trial, and that they were therefore entitled to recover the costs thereby incurred from the defendant; and he gave judgment accordingly.

Against this judgment the defendant appealed.

Henn Collins, Q.C., and *H. Tindal Atkinson*, for the defendant. The plaintiffs in the present action are not entitled to recover from the defendant their costs of defending the action brought against them by the persons with whom they contracted over. Such costs do not come within the rule stated in *Hadley* v. *Baxendale*. (1) They are not damages which can fairly and reasonably be considered to arise naturally from the breach of the contract itself, nor such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The plaintiffs

(1) 9 Ex. 341.

1887

HAMMOND & Co. v. BUSSEY.

need not have defended the action against themselves. They had a remedy over against the present defendant, and, if they chose to defend the first action, and obtain an assessment of damages, they did it for their own benefit. It cannot have been within the contemplation of the parties to the first contract at the time they made it that there would be a breach, that the plaintiffs would be sued, and that they would incur costs in unsuccessfully defending the action. Such costs might be altogether disproportionate to any profit made by the defendant on his contract, as where the plaintiffs had contracted over to supply the goods to a foreign firm, and the expense of sending out commissions had to be incurred. The decisions of the Courts have drawn a line between damages and costs in such cases as this, and have established that, where the plaintiff has made a separate and independent contract over, though he may recover the damages he has had to pay to his sub-vendees, he cannot recover the costs he has incurred in obtaining an assessment of those damages. In effect the decisions have established that, except in cases where the defendant has expressly or impliedly contracted to indemnify the plaintiff in respect of all the consequences of any breach of a contract made by him, the costs incurred by the plaintiff in defending an action by the persons with whom he has contracted over cannot be brought within the rule in *Hadley* v. *Baxendale*. (1)

[LORD ESHER, M.R. The plaintiffs' case is that these costs are within the second part of the rule in *Hadley* v. *Baxendale* (1), that is to say that they are damages which must reasonably be supposed to have been in the contemplation of the parties to the contract, at the time they made it. Must not that question depend upon the particular facts of each case ?]

The authorities are against that view. In *Baxendale* v. *London Chatham and Dover Ry. Co.* (2) the principle here contended for was laid down, though the Court also said that it was unreasonable for the plaintiffs to have defended the first action; and the majority of the Court expressly disapproved of *Mors le Blanch* v. *Wilson* (3), and said that it was undistinguishable from the case they were then dealing with, because there were two separate and

(1) 9 Ex. 341. (2) Law Rep. 10 Ex. 35.
(3) Law Rep. 8 C. P. 227.

independent contracts. Now, in that case the decision was that the assessment of damages against the plaintiff in the previous action was conclusive in his action against the defendant, and that he could recover from the defendant the costs of defending the first action. The jury had found that it was a reasonable thing for him to defend. *Baxendale* v. *London, Chatham and Dover Ry. Co.* (1) is therefore an authority for the proposition that, where it is a reasonable thing to defend the first action and obtain an assessment of damages, nevertheless the plaintiff in the second action, if there have been merely two separate and independent contracts, and no contract of indemnity, cannot recover the costs of defending the first action. In *Fisher* v. *Val de Travers Asphalt Co.* (2) there was a finding of the jury that it was reasonable for the plaintiff, who had made a sub-contract with a tramway company, to defend the action brought against him by them, but a Court of the Common Pleas Division held that, though he could recover from the defendant, with whom he had made the first contract to construct a tramway, the damages recovered against him, he could not recover the costs, because the case was concluded by the decision in *Baxendale* v. *London, Chatham and Dover Ry. Co.* (1). In *Hornby* v. *Cardwell* (3) both Jessel, M.R. and Brett, L.J., recognise and approve of the decision in *Baxendale* v. *London, Chatham and Dover Ry. Co.* (1) on the ground that there was no contract by the defendant to perform the contracts of the plaintiff, nor any contract of indemnity.

[LORD ESHER, M.R. In all these cases was it not the first part of the rule only in *Hadley* v. *Baxendale* (4) which was sought to be applied? The question was whether the costs were damages which arose naturally from the breach of the contract.]

In *Walker* v. *Hatton* (5) the plaintiff, lessee of premises with covenants to repair, sub-let them to defendant with the same covenants. It was held that the plaintiff could not recover from the defendant the costs of defending an action for breach of covenant to repair brought by the original lessors. In that case the costs, as being damages likely to be incurred by the plaintiff,

(1) Law Rep. 10 Ex. 35.
(2) 1 C. P. D. 511.
(3) 8 Q. B. D. 329.
(4) 9 Ex. 341.
(5) 10 M. & W. 249.

1887

HAMMOND & Co. v. BUSSEY.

were at least as much in the contemplation of the parties to the underlease as they were in the contemplation of the parties here. *Logan* v. *Hall* (1) and *Penley* v. *Watts* (2) are to the same effect. Here the warranty by the defendant that the coals should be reasonably fit for the purpose for which they were supplied did not constitute a contract to indemnify the plaintiffs against the consequences of a breach of warranty by them. There was no contract, express or implied, to indemnify, within the definition of what constitutes such a contract given by Brett, M.R., in *Speller* v. *Bristol Steam Navigation Co.* (3) and by the Court in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (4) As to the cases which will be cited against the contention for the defendant, *Collen* v. *Wright* (5) is distinguishable. The ground of the decision was that the defendant, having asserted that he had authority to let a farm as the agent of another, was estopped from saying that the costs occasioned by a breach of the supposed contract, which he put forward as a contract made by him with such authority, were not reasonably incurred. It is conceded that *Lewis* v. *Peake* (6) is against the defendant's contention, but that case is not fully reported, and is contrary in principle to the subsequent decision of the Exchequer Chamber in *Baxendale* v. *London, Chatham and Dover Ry. Co.* (7)

Finlay, Q.C., and *W. Graham*, for the plaintiffs. The plaintiffs are entitled to recover these costs as being damages which may reasonably be supposed to have been in the contemplation of the parties as a probable result of any breach of the defendant's warranty. The facts of this case come exactly within the second branch of the rule in *Hadley* v. *Baxendale* (8), and there is no subsequent case which prevents its application to them. The cases decided upon the rule as to bringing in third parties have no bearing on the present case. In the cases where the action was by lessee against sub-lessee to recover costs of defending an action by the lessor for breach of covenant to repair, the real ground for holding that the costs were not recoverable was that

(1) 4 C. B. 598.
(2) 7 M. & W. 601.
(3) 13 Q. B. D. at p. 101.
(4) 34 Ch. D. 261.
(5) 8 E. & B. 647.
(6) 7 Taunt. 153.
(7) Law Rep. 10 Ex. 35.
(8) 9 Ex. 341.

it was unreasonable to defend the action, the premises being out of repair. Here the defendant insisted all along that the coal was according to contract, and the plaintiffs had really no alternative as reasonable men under the circumstances but to defend the action. The present case is one where the vendor sells with a warranty knowing that his vendees buy the coal to resell with a similar warranty, that they are therefore going to incur liabilities on the strength of the contract; and all the loss which naturally results to the plaintiffs in consequence of the breach of the defendant's contract is recoverable as damages: *Randall* v. *Raper* (1); *Grébert-Borgnis* v. *Nugent*. (2). If the previous action was reasonably defended, the costs incurred by reason of such defence are the natural consequences of the defendant's breach of contract. It is clear, and is not disputed, that the damages in the previous action are recoverable, and it is impossible to draw any sound distinction between the damages and the costs. The case of *Lewis* v. *Peake* (3) is a direct authority in the plaintiffs' favour. The case of *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (4) is distinguishable, for there the Court held that the costs were not reasonably incurred.

[They also cited *Godwin* v. *Francis* (5) and *Hydraulic Engineering Co.* v. *McHaffie*. (6)]

Henn Collins, Q.C., in reply. It is not denied that it may have been a reasonable thing for the plaintiffs to defend the action against them; but in order that costs such as these may be recoverable, there must be an express or implied contract of indemnity. There would be an implied contract to indemnify where one person in substance contracted to perform another contract entered into by the person with whom he contracted. Such is the effect of the judgment of the Master of the Rolls in *Grébert-Borgnis* v. *Nugent*. (2) The present case falls far short of that. Here at the time of making the contract with the defendant the plaintiffs had not contracted for the re-sale of the coal. The two contracts were entirely distinct and independent of each other.

(1) E. B. & E. 84; 27 L. J. (Q.B.) 266.
(2) 15 Q. B. D. 85.
(3) 7 Taunt. 153.
(4) Law Rep. 10 Ex. 35.
(5) Law Rep. 5 C. P. 295.
(6) 4 Q. B. D. 670.

1887

HAMMOND & Co. v. BUSSEY.

LORD ESHER, M.R. In this case the plaintiffs bought from the defendant "steam-coal," which was to be coal suitable for use on steamers. At the time when the defendant sold the coal, he knew that the plaintiffs were buying the coal in order to sell it again to the owners of steamers calling at Dover to be used as steam-coal on such steamers; and he therefore knew that the plaintiffs would enter into contracts with others similar to the contract he himself had made with the plaintiffs, that is to say, into contracts for the sale of steam-coal, which would amount to a warranty that the coal was reasonably fit to be used for the purposes of steam-coal on board steamers. He did not know, it is true, with what specific persons the plaintiffs would make such contracts, but that seems to me immaterial. The defendant supplied under the contract coal that was not reasonably fit to be used as such steam-coal, that is to say, something different from that which he had contracted to supply. The fact that this was so was not a fact which would be patent to the plaintiffs on inspection of the coal; it could only be found out when it came to be used, which was not by the plaintiffs but by their sub-vendees. Such a breach of such a contract with regard to such a subject-matter necessarily made the plaintiffs liable to an action by their sub-vendees, and the result was the plaintiffs were sued for damages by their sub-vendees. The plaintiffs, when sued, would be in the difficulty that they had had no opportunity, at the time when they entered into the sub-contract, or when they delivered the coal, of knowing whether the coal answered the description given in such sub-contract. What then was the plaintiffs' position? Was it reasonable that they should take the mere word of the persons making a claim upon them that the coal was, not merely bad, but so bad that it could not reasonably be considered fit for use as steam-coal on steamships? Was it reasonable that they should, whether they were dealing with the matter on their own account or on account of the defendant, submit to such a claim without having in any way tested it?

If the defect in the coal had been one which would have been patent on inspection, and which the plaintiffs could have seen before they sold the coal again, the case might have assumed a different aspect. That not being so, the plaintiffs would have

nothing to rely upon at first but the mere word of the sub-vendees. Under those circumstances it would not have been reasonable, either on their own account or on that of the defendant, for the plaintiffs to submit to judgment at once without defending the action or testing the claim in any way. If they were to defend the action, of course they would not be sure to win; whether they would win or lose would depend on the extent to which the evidence went as to the quality of the coal, of which the plaintiffs could not judge, and which they probably could not satisfactorily ascertain or prove without the assistance of the defendant. In order to make themselves as safe as possible in this respect, the plaintiffs gave notice of the claim against them to the present defendant, and thereupon the defendant insisted that the coal he had supplied was according to contract. The value of that fact is to shew the plaintiffs' position, and to make it still more reasonable that they should defend the action by their sub-vendees against them. They accordingly defended the action, and of course would become liable to costs in that action if, by reason of any breach of contract by the defendant, the defence was unsuccessful. That defence appears to have turned entirely on the question of breach of warranty. There is nothing to shew that it depended on anything else, or that any damages were given except for the breach of warranty. The defendant has admitted that the damages given in that action were merely the damages naturally resulting from the breach of warranty, for he has paid the amount of them into court in this action. Furthermore, it is not suggested that the costs which the plaintiffs incurred were extravagantly or recklessly incurred, or that they are anything but fair and honest costs of a fair and honest defence. The plaintiffs sue the defendant for the damages occasioned by his admitted breach of contract, viz., in supplying coal not according to contract. The question is, what are the damages which they can recover? We find the rule of law as to measure of damages enunciated in the case of *Hadley* v. *Baxendale*. (1) It may be that the rule so laid down was not necessary for the purpose of deciding that case, but it is far too late to question it. The rule, though frequently commented upon, has been over and

(1) 9 Ex. 341.

1887

HAMMOND & CO. v. BUSSEY.

Lord Esher, M.R.

over again adopted by the Courts, and must now be considered to be the law on the subject. We must therefore treat the present case on the footing that the question is as to the true application of that rule to the measure of damages for such a breach of such a contract under such circumstances as we have to deal with here. We have not got to determine how that rule would apply to other breaches of other contracts under other circumstances than those we have now to consider. The rule is laid down thus: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract"—it is to be observed in passing that the rule is not contemplating a breach of a contract to pay damages, but the damages which are recoverable in respect of a breach—"should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself." That is the enunciation of the rule with regard to damages for a breach of contract where no special circumstances arise, and would apply to this case if there had been no sub-contract which the defendant knew to exist or to be likely to be made. The rule goes on to state what the measure of damages is where there are special circumstances, as follows: "or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." It has been argued that these words are not an enlargement of the former part of the rule, but I cannot take that view of them. It is to be observed that the words are not "such damages as were in fact in the contemplation of the parties at the time they made the contract," which would have raised a question of fact for the jury, but "such as may reasonably be supposed to have been in the contemplation of the parties," not as the inevitable but as "the probable result of the breach." The next sentence of the judgment is, I think, to be considered rather as a valuable exemplification of the rule, an illustration of the circumstances under which the second branch of the rule would apply, than as part of the rule itself. It proceeds: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both

parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." I do not think that there is anything in those words to shew that the second branch of the rule must be confined to the case of a sub-contract already actually made at the time of the making of the contract, and would not apply to the case of a sub-contract not yet actually made, but which will probably be made. I think that this sentence must be looked upon as intended to be an exemplification of the second branch of the rule already stated rather than as part of it; and in any case it seems to me clear that the rule would apply to the case of a sub-contract which within the knowledge of the defendant was in the ordinary course of business sure to be made. We have to apply that rule to the sale and purchase of such an article with such a warranty as that now in question, with the knowledge on the part of the vendor that there would be a subsale by the vendees with a similar warranty; and to see whether, under these circumstances, the bringing of an action by the sub-vendees in the event of there being a breach of the warranty by the vendees, and the defence of such action by the vendees, are consequences that may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as a probable result of the breach of it. Such a question is one upon which those who have to determine it must exercise their minds according to the circumstances of the particular case. It is impossible for us to lay down a rule as to what would be reasonably to be supposed to have been in the contemplation of the parties in the cases of other contracts made with regard to other subject-matters under other circumstances. We can only apply the rule laid down as above stated to the circumstances of the case before us. We must say, using our knowledge of business and affairs, what may reasonably be supposed to have been in the contemplation of the parties as the result of a breach of the contract under the circumstances. I do not think that the question is one for a jury, though I think that possibly, under certain circumstances, with regard to some subject-matters, it would be competent to a judge

Lord Esher, M.R.

1887

HAMMOND & Co. v. BUSSEY.

Lord Esher, M.R.

to ask particular questions of a jury in order to assist him in coming to a conclusion on such a question. There are, however, no such circumstances here. I cannot doubt that any business man would contemplate, as being, according to the ordinary course of things under the circumstances, not only the probable but the inevitable result of such a breach of contract, that there would be a lawsuit by the sub-vendees, and that the reasonable course to be pursued by the vendees might be that they should not at once submit to the claim but that, unless they could get information from the vendor that there was really no defence, they should defend the action. It would not, of course, be the inevitable result that the vendees should lose the action; that would depend on the question whether there was a breach of the warranty, and whether, if so, it could be proved. If, however, it were proved, then of course the result would be that the vendees must incur costs; and it seems to me that such costs would under the circumstances come within the second branch of the rule in *Hadley* v. *Baxendale.* (1)

It has been argued that, upon the true construction of the rule in that case, such costs cannot be recoverable as the result of a breach of contract, unless there has been a contract of "indemnity." The meaning of that term has been much discussed during the argument. I may in previous cases, in which the question was as to the damages incurred by reason of the breach of a contract, where there was a sub-contract, have used expressions to the effect that, where the special circumstances were known to the original vendor, the law would imply a contract to indemnify. I do not feel sure, having regard to the language used by Willes, J., in *Collen* v. *Wright* (2), that the obligation implied by the law under such circumstances as those with which we are now dealing might not be correctly expressed by that formula; but I purposely abstain from so deciding. I do not think it necessary to put the case on that footing, inasmuch as the way in which I have put it, by applying the rule in *Hadley* v. *Baxendale* (1), viz., that the question is whether the damages claimed may reasonably be supposed to have been within the contemplation of the parties at the time when they made the contract, seems to be another

(1) 9 Ex. 341. (2) 8 E. & B. 657.

and perhaps a better way of expressing it. For the purpose of substantiating the argument that there must be a contract to indemnify, express or implied, in order to enable costs such as these to be recovered as damages, expressions used in previous cases have been referred to. The language used by me in the case of *Grébert-Borgnis* v. *Nugent* (1) has been relied upon for the defendant. But that language must be read in connection with the subject-matter. I was there giving an account of the circumstances of that case, as I have given an account of the circumstances of this case, and I used that language in expressing what I conceived to be the particular circumstances of that case, which made the rule in *Hadley* v. *Baxendale* (2) applicable. It seems to me immaterial whether the phraseology I used in so doing was exactly accurate, for, if the circumstances of that case did come within that rule, it comes to the same thing. There was nothing said by me in that case which really adds anything to or takes anything from the rule enunciated in *Hadley* v. *Baxendale* (2) as applicable to a case like the present. The case of *Birmingham, &c., Land Co.* v. *London and North-Western Ry. Co.* (3) was referred to for the same purpose. It is only necessary to say with regard to that case that the Court was not there construing the rule as to damages laid down in *Hadley* v. *Baxendale* (2), but the provisions of Order XVI., rule 48, with regard to the question whether the third party procedure was applicable. It does not seem to me that such a case has any bearing upon the present question. There are cases which would, no doubt, be authorities on the question before us but for the fact that they were decided prior to *Hadley* v. *Baxendale* (2). *Lewis* v. *Peake* (4) is such a case, but I do not think such decisions are now of any use. It seems to me that the case of *Collen* v. *Wright* (5) is really a strong authority with regard to the question now before us, though of course the Court were not there dealing especially with the rule as to measure of damages. Then I come to the case of *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (6) If I thought that that case had decided that, however reasonably it

(1) 15 Q. B. D. 85.
(2) 9 Ex. 341.
(3) 34 Ch. D. 261.
(4) 7 Taunt. 153.
(5) 8 E. & B. 647.
(6) Law Rep. 10 Ex. 35.

1887

HAMMOND & Co. v. BUSSEY.

Lord Esher, M.R.

might be supposed that the parties contemplated that there would be an action on the sub-contract as a result of the breach of contract, and that the plaintiffs, acting as reasonable men, would defend that action, and however reasonable the incurring of the costs might be, yet those costs could not be recovered as damages, I should feel bound by that decision, for it is a decision of a Court of co-ordinate jurisdiction. And I must admit that I have felt considerable anxiety as to whether the decision does touch the point now before us. It is useless to discuss at length all the verbal criticism which has been directed during the argument to the language of the judgments in that case. I must confess to feeling some difficulty as to the exact effect of much that was said in those judgments, but I think it is quite clear that what the Court did in effect decide was that the costs in question were not reasonably incurred in that case, and therefore they could not be recovered. The case therefore decides that, where the costs are unreasonably incurred, they cannot be recovered, but it is not, as it seems to me, a decision that, where the costs were under all the circumstances reasonably incurred, they cannot be recovered. I then come to the case of *Fisher* v. *Val de Travers Asphalt Co.* (1) I must admit, after the discussion that has now taken place, that I doubt whether, when that case came before the Court, I did quite correctly appreciate what was decided and what was not in the case of *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (2) Assuming that I did not in that case take an altogether correct view of the decision in *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (2), and therefore gave a wrong reason for the decision there, that could have no effect upon the true meaning of the previous decision; and it by no means follows that, because a reason given for the decision in *Fisher* v. *Val de Travers Asphalt Co.* (1) was wrong, that therefore the decision itself was wrong. It is unnecessary, however, now to discuss that question. It does not seem to me that there is really any case which alters the rule as laid down in *Hadley* v. *Baxendale* (3), or which prevents our applying that rule in the terms in which it stands in the judgment there given as I have

(1) 1 C. P. D. 511. (2) Law Rep. 10 Ex. 35.
(3) 9 Ex. 341.

1887

HAMMOND & Co. v. BUSSEY.

Lord Esher, M.R.

applied it to the present case. To my mind it is perfectly clear that, according to a reasonable business view of the reasonably probable course of business, the parties may be supposed to have contemplated, at the time when the contract was made, as the inevitable or at any rate the highly probable result of a breach of it, that there would be a lawsuit between the plaintiffs and their sub-vendees, in which it would be reasonable for the plaintiffs to defend, and in which, if it turned out that there was a breach of the warranty, the plaintiffs would lose, and that they would thereby necessarily incur costs. Costs incurred under such circumstances appear to me to fall within the second branch of the rule in *Hadley* v. *Baxendale*. (1) I therefore think that the plaintiffs were entitled to recover over from the defendant in respect of their costs, and that the decision of the learned judge below was right, and should be affirmed.

BOWEN, L.J. In this case, as it appears to me, we have to apply to a special subject-matter, viz., the breach of a particular kind of contract made under special circumstances, the general rule of law with regard to the measure of damages laid down in *Hadley* v. *Baxendale*. (1) The law is laid down in that case; the only question is as to its application under the circumstances of the present case. The rule as laid down in that case is, that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. It seems to me that the latter portion of that rule is what we have in this case to apply. In the present case the costs incurred by the plaintiffs in defending a previous action brought against them by their sub-vendees are the subject-matter of the action. To such costs we have to apply the second branch of the rule which I have mentioned: and the question therefore is whether such costs

(1) 9 Ex. 341.

1887

HAMMOND & Co. v. BUSSEY.

Bowen, L.J.

under the special circumstances of the case come within the words there used. Is the damage occasioned to the plaintiffs by the loss of such costs a damage which may reasonably be supposed to have been within the contemplation of the parties, at the time when they made the contract, as a probable result of the breach of it? The way in which this branch of the rule should be brought to bear upon a somewhat cognate class of cases, viz., where damages recovered against one of the contracting parties by a third person are sought to be recovered from the other contracting party, has been illustrated by the judgment of this Court in *Grébert-Borgnis* v. *Nugent*. (1) No new law, however, was laid down in that case, though it is one of some importance, because it contained an elaborate exposition of the manner in which the second branch of the rule in *Hadley* v. *Baxendale* (2) is to be applied in such cases; and difference of subject-matter does not necessarily prevent the case being useful as an illustration how the rule should be applied in another case. I propose to begin by asking myself what may be reasonably supposed to have been in the contemplation of the parties when they entered into the contract containing a warranty that the coal to be supplied was steam-coal fit for use on steamships. As soon as that question is answered, the solution of the problem is arrived at, and we know whether the case falls within the rule in question. Here was a case of a sale of coal by the defendant, who had purchased the coal from his correspondents in Wales, to the plaintiffs, who were mere shipping agents, and who resold with the same warranty as that with which they had themselves purchased from the defendant. The defendant knew for what purpose the plaintiffs were purchasing the coal, viz., to resell it to the owners of steamers, and he must have known as a business man what damages might naturally result to the sub-vendees if it was not reasonably fit for the purposes of steamships, and therefore could not be used by the sub-vendees for such purposes. He may therefore be reasonably supposed to have contemplated, if the warranty were broken, that claims for damages would be made against the plaintiffs by the sub-vendees, and also, if he thought about it, he must have known that the plaintiffs, if such claims

(1) 15 Q. B. D. 85. (2) 9 Ex. 341.

1887

HAMMOND & Co. v. BUSSEY.

Bowen, L.J.

were made, would be in a position of difficulty: on the one side would be the sub-vendees who had tried the coal insisting that it was bad and incapable of being used as steam-coal, and that they had in consequence sustained damage; on the other side would be the defendant who knew more about the origin of the coal than the plaintiffs did, and who might refuse to be bound by any action they might take with regard to the sub-vendees' claims and assert that such action was unreasonable. What under such circumstances might the defendant be reasonably supposed to contemplate in the event of such a contingency happening? Obviously that the plaintiffs would come to their vendor in order to know how to deal with the claim, and that it would depend very much on what he said what course they would take, and whether they would defend the action or not. If the vendor said that the assertions of the sub-vendees with regard to the inferior quality of the coal were unfounded, the plaintiffs would naturally attach much weight to that; on the other hand, if he said that he had been imposed on by his vendors, naturally they would submit to the claims of their sub-vendees. What further could the defendant reasonably be supposed to contemplate? Why that, if under such circumstances he told the plaintiffs that, if they did not defend the action, it would be at their own responsibility and risk, and that the coal he sent was according to contract, the plaintiffs' only reasonable course would be to fight the action in order to thrash the question out; and, then, of course, if the plaintiffs succeeded in their defence, there would be no occasion for their making any claim over; but if they failed the defendant must in reason be taken to have contemplated that they would have to pay damages and costs. All these matters I have mentioned seem to me to be matters that may reasonably be supposed to have been within the contemplation of the parties at the time they made the contract, and therefore the question whether the case comes within the second branch of the rule in *Hadley* v. *Baxendale* (1) seems to me to be answered, unless the argument of the defendant's counsel with regard to the construction of that rule is to be accepted. I pause here to point out that in this particular case

(1) 9 Ex. 341.

1887

HAMMOND & Co. v. BUSSEY.

BOWEN, L.J.

there is a very special state of facts; because the defendant was consulted before the action was defended, as the correspondence shews, and he thereupon insisted that the coal was according to the contract, and so he may be said really to have driven the plaintiffs to defend the action; and not only that, but the damages recovered in the action were paid by the defendant into court, whereby the defendant admits that he is bound to recoup the plaintiffs in respect of those damages; so that the case is not complicated by any question whether the action against the defendant involves any damage recovered in the previous action, which as against him might be too remote or special. These are important matters to consider in applying our decision in this case, if it should ever be cited hereafter, to the circumstances of other cases. It is beyond question, by reason of this payment into court, coupled with the admissions made by counsel during the argument, that the course taken by the plaintiffs in defending the action by their sub-vendees was a reasonable course to take. Therefore the case comes to this question, viz., whether we can possibly say that it cannot reasonably be supposed to have been within the contemplation of the contracting parties that, the plaintiffs being sued by their sub-vendees and inquiring of the defendant as to the quality of the coal and being told by him that that coal was according to contract, they would do what was plainly reasonable in defending the action. The reason why I have dwelt so on the particular details of this case is because, like the Master of the Rolls, I conceive that we are in this case merely applying an existing rule of law: not laying down any such doctrine as that in the case of every contract of sale, where there is a subsale, the costs of the defence of an action brought by the sub-vendee for breach of a warranty similar to that contained in the original contract of sale are recoverable within the rule in *Hadley* v. *Baxendale.* (1)

How, then, does the defendant's counsel meet the suggested application of that rule to the special circumstances of this case? He contends that the costs of defending an action are necessarily outside the damages that can be considered as resulting from the breach of warranty. I cannot see that he gave any sufficient

(1) 9 Ex. 341.

1887

HAMMOND & Co. v. BUSSEY.

Bowen, L.J.

reason for that conclusion. He argued that such costs could only be within the rule as to measure of damages where they are the subject of a special contract of indemnity, either express or to be implied from the circumstances. We invited him to explain what he meant by an implied contract of indemnity in this relation. He said that such a contract would be implied where the circumstances were such that a person must be considered to have contracted with another person to perform a contract upon which such other person was liable. But, if he is right, in such a case the application of the rule in *Hadley* v. *Baxendale* (1) would be unnecessary; because, if there is what amounts to a special bargain as to the costs, the question whether they can be treated as damages, the consequences of the breach of contract, does not arise. They are the subject-matter of the contract itself, and the case is like that of any other contract to pay a sum of money. I doubt myself whether it is a true view to say that there is any contract of indemnity in such a case as this, though it is really unnecessary to decide that point; I doubt whether out of the contract to do a particular thing, you can extract a contract, if that is not done, to do something else. The reasons against this view of the matter were expressed by the Court in the case of *Hydraulic Engineering Co.* v. *McHaffie* (2), by my brother Fry and myself in the case of *Birmingham Land Co.* v. *London and North Western Ry. Co.* (3), and by the late Master of the Rolls in *Hornby* v. *Cardwell.* (4) If the expressions used by the present Master of the Rolls in the last-mentioned case are to be considered as really conflicting with what he said in *Hydraulic Engineering Co.* v. *McHaffie* (2), with great submission I should consider what he said in the latter case as of more authority, because it is obvious that there the point was definitely suggested to his mind for consideration, whereas in the other case it was not, and if it had been, he would probably have said that whether the case was treated as one of indemnity or as coming within the rule in *Hadley* v. *Baxendale* (1) the result would be the same. I do not wish, however, to express any opinion on this point, for it seems to me unnecessary to do so.

(1) 9 Ex. 341.
(2) 4 Q. B. D. 670.
(3) 34 Ch. D. 261.
(4) 8 Q. B. D. 329.

1887

HAMMOND & Co. v. BUSSEY.

Bowen, L.J.

Assuming that there is no contract of indemnity, can it be said that such costs can never come within the second branch of the rule in *Hadley* v. *Baxendale*? (1) If so then, although it be assumed that beyond question it was actually present to the minds of both parties that the result of the breach of contract would be an action against one of them, and that he would under the circumstances be compelled as a reasonable man to defend that action, and that he might lose, yet the costs incurred by him could not be recoverable within the rule. Why should this be so? What is there peculiar in the nature of costs to exclude them from the ordinary rule? If on the other hand they can be within the rule, then whether the particular costs in question are within it must be determined with reference to the circumstances of the particular case. I suppose the suggestion with regard to the peculiarity of costs may be that when a litigation once begins, no one knows where it will end, and that it may go to the House of Lords, but I do not say that, because costs in a particular case may be recoverable within the rule in *Hadley* v. *Baxendale* (1), therefore all costs would be so. It would be necessary to consider at each stage how far the particular costs came within the rule. Against the contention that no costs can come within it, there is, as it appears to me, an abundance of authority. One such authority, for instance, is the case of *Collen* v. *Wright*. (2) It is true that that case belongs to a different class of cases, viz., where a person who has professed to act as an agent is sued on an implied warranty of authority. In that case Willes, J., said, after describing the implied contract that arose, "With respect to the amount of damages, I retain the opinion thrown out in the course of the argument that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract being continued and persisted in by the defendant's testator and bonâ fide acted on by the plaintiff." Although the origin of the obligation to repay such expenses differs in the two cases, yet it is common ground in that case and the present that the costs might be recovered, because in each case they were damages naturally resulting from the breach of contract, in the one case an implied

(1) 9 Ex. 341. (2) 8 E. & B. 647.

warranty of authority, in the other the express warranty of the quality of the articles sold. I know of no ground on which such costs could be recoverable in the one case that is not applicable to the other. Various other cases were cited with regard to the question whether such costs as these could be recovered as damages. It is unnecessary to go through them all, but I desire to make with regard to such cases these general observations: either they were cases in which costs were dealt with before the decision in *Hadley* v. *Baxendale* (1), or they were cases in which the costs were unreasonably incurred, and where of course they could not come within the rule in *Hadley* v. *Baxendale* (1); or they were cases in which the rule was wholly inapplicable. I wish to say a few words with regard to the decision in *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (2) I feel the same difficulty as the Master of the Rolls in dealing with that case. Most, if not all, of the judges who decided that case seem to have thought that the first action was unreasonably defended. If so, no question could possibly arise under the rule in *Hadley* v. *Baxendale* (1); but, if that was the general opinion, why did they not decide the case simply on that ground? They must have meant something more than that, but what, I confess, I do not at present exactly understand; but in any case I do not think they laid down anything that really conflicts with our present judgment; on the contrary, it seems to me that all the judgments proceeded on facts which entirely distinguish that case from the present, and take it out of the category of cases which could come within the second branch of the rule in *Hadley* v. *Baxendale*. (1) For these reasons I agree that the appeal should be dismissed.

FRY, L.J. I hope to be able to state my reasons for concurring with the Master of the Rolls and my brother Bowen very briefly. The case seems to me really to turn on the second branch of the rule laid down as to damages in *Hadley* v. *Baxendale* (1) as illustrated by the example which follows that rule in the next sentence of the judgment. Taking that to be the rule applicable, there are I think four questions which have to be

(1) 9 Ex. 341. (2) Law Rep. 10 Ex. 35.

1887

HAMMOND & Co. v. BUSSEY.

FRY, L.J.

answered in order to see whether these costs come within it. First, what are the damages which actually resulted from the breach of contract? It seems to me that the loss actually sustained by reason of such breach was that of the damages recovered by the sub-vendees in their action against the plaintiffs and the costs of that action. Secondly, was the contract made under any special circumstances, and, if so, what were such circumstances? It appears that it was made by the plaintiffs with the intention of re-selling the coal to steamships visiting Dover in the course of their usual business. Thirdly, what at the time of making the contract was the common knowledge of both parties? The purposes for which the plaintiffs bought the coal were as well known to the defendant as to the plaintiffs themselves. Having thus ascertained the special circumstances under which the contract was made, and the knowledge of the parties with regard to them, we come to the last question, viz., what may the Court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?

It seems to me that they must have contemplated, if there was a breach of the contract, that the plaintiffs' sub-vendees would make a claim and bring an action against the plaintiffs to enforce such claim; and further, that the plaintiffs would on such an action being brought behave as reasonable men and would pay without contest if it was unreasonable to defend the action, but would defend the action if it was reasonable to do so. I think all these matters may be reasonably supposed to have been within the contemplation of the parties. That being so, it follows that the costs of a reasonable defence would be in the contemplation of the parties, if they had worked out the question what the damages were which would reasonably be payable upon a breach of contract. Therefore it seems to me that, applying the rule in *Hadley* v. *Baxendale* (1) to the special circumstances of this case, we arrive at the conclusion that these costs ought to be recovered as damages. It appeared hardly to be contested that it might be so in point of principle, but it was argued that there was a

(1) 9 Ex. 341.

1887

HAMMOND & Co. v. BUSSEY.

Fry, L.J.

series of decisions shewing that, however reasonably such costs might be incurred, they could not be recovered under the rule in question except in cases where there was a contract of indemnity, and that there was no such contract in this case. I still entertain the doubts which I expressed in *Birmingham, &c., Land Co.* v. *London and North Western Ry. Co.* (1) as to whether an implied contract of indemnity can be raised in the case of a contract to do a particular thing, where the minds of the parties in contracting are directed not to the breach but to the performance of the contract; but, however that may be, I do not think that there is any such series of decisions as alleged. There are only two cases I think which can be relied on in support of the contention of the defendant's counsel, one of which is binding upon us, but the other is not. The case of *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (2) does give rise to some little difficulty. I may be presumptuous in supposing that I understand that case after what my brothers have said, but it seems to me, when the case is looked at, that the explanation of it is this. The case was decided in the court below on the supposition that the decision in *Mors le Blanch* v. *Wilson* (3) established two propositions, one being that the costs could be recovered in such a case where the action was reasonably defended, the other that they could be recovered, though the action was unreasonably defended, if the incurring of such costs had been of use as leading to the assessment of the damages which could be recovered over against the defendant. Cleasby, B., in giving judgment says: "In considering this question we think we ought to abide by the rule laid down or rather, I should say, acted upon in *Mors le Blanch* v. *Wilson* (3), according to which a jury are to give such costs as were reasonably incurred by the plaintiffs in the action brought against them either in defending the action or otherwise ascertaining the amount of the liability." I confess I do not think that the case of *Mors le Blanch* v. *Wilson* (3) did decide that the costs of an unreasonable defence could be recovered on the ground that they had assisted in ascertaining the damages which the plaintiff could recover over against the defendant; I do not see how the verdict as to

(1) 34 Ch. D. 261. (2) Law Rep. 10 Ex. 35.
(3) Law Rep. 8 C. P. 227.

1887

HAMMOND & Co. v. BUSSEY.

FRY, L.J.

the damages in the one action could be binding as an estoppel in the other. When the case of *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (1) went to the Exchequer Chamber, one point there discussed was whether the defence in the former action was reasonable, and the Court held that it was not. That decision to my mind put an end to the whole case, for I do not understand how in such case the costs could be recoverable within the rule in *Hadley* v. *Baxendale* (2), whether there was a contract of indemnity or not; but the Court seem to have thought it necessary to consider the question, whether, though the defence was unreasonable, the costs had been usefully incurred in ascertaining the damages, and they therefore proceeded to discuss that point, and came to the conclusion that the costs of an unreasonable defence were not recoverable, because they had been of use in ascertaining the damages. I think that is the substance of what the judges said. They said that if *Mors le Blanch* v. *Wilson* (3) had the effect which it was supposed to have in the court below, which I confess I do not think it had, they overruled it. Lord Coleridge, C.J., said: "The judgment must be reversed; it seems to have proceeded wholly on the case of *Mors le Blanch* v. *Wilson* (3), which is certainly very like this case, and which, if necessary, should in my opinion be overruled." It seems to me that the effect of what the other judges said was that *Mors le Blanch* v. *Wilson* (3) did not decide what it had been supposed to decide, but that, if it did, it should be overruled. I do not think that any of the cases really lays down any such principle as has been asserted by the defendant's counsel; and so we are at liberty to apply the rule in *Hadley* v. *Baxendale* (2) in the terms in which it was originally stated; and I hold that under the circumstances of this case the costs now in question come within the second branch of the rule. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendant: *Bower, Cotton, & Bower, for Stilwell.*

(1) Law Rep. 10 Ex. 35. (2) 9 Ex. 341.
(3) Law Rep. 8 C. P. 227.

E. L.

THE GUARDIANS OF THE POOR OF THE AMERSHAM UNION, APPELLANTS; THE GUARDIANS OF THE POOR OF THE CITY OF LONDON UNION, RESPONDENTS.

1887
Nov. 18.

Poor-law—Settlement—"Widowed Mother," Second marriage—Child under Sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

A pauper under the age of sixteen, whose father was dead and whose mother had married again without having acquired a settlement for herself during her widowhood, became chargeable to the respondent union, and an order was made for her removal into the appellant union, in which her mother had been born:—

Held, that the order was bad; that at the time of the making of the order of removal the pauper had no "widowed mother" within the meaning of s. 35 of the Divided Parishes Act, 1876, whose settlement she could take, and that the pauper took her own birth settlement.

SPECIAL CASE stated pursuant to 12 & 13 Vict. c. 45, s. 11, on appeal against an order of removal.

On January 8, 1887, an order was made by two justices acting in and for the city of London adjudging Blanche Edmonds to be last legally settled in the parish of Chesham in the appellant union.

Blanche Edmonds, the pauper, who was an idiot, was the legitimate daughter of Walter Edmonds (deceased) and Sarah Ann Edmonds, his wife, and was born in the year 1881 in the parish of St. Mary, Islington.

Sarah Ann Edmonds, the mother of the pauper, was born in the parish of Chesham in the appellant union.

Walter Edmonds, the pauper's father, died in May, 1883; he had never acquired a settlement for himself, and had no settlement other than that of his birth, which was in the Hemel Hempstead Union.

In January, 1884, Sarah Ann Edmonds, the pauper's mother, being then a widow, married Henry Paine, her present husband, who was born in Kent. During the interval between the death of her first husband and her second marriage the pauper's mother did not acquire any settlement for herself.

The appellants contended that the pauper at the time of making the order was legally settled in the parish where she was born, as

1887

GUARDIANS OF POOR OF AMERSHAM UNION v. GUARDIANS OF POOR OF CITY OF LONDON UNION.

after the death of her father her mother never had or acquired any but a derivative settlement, and also because her mother was not, when the pauper became chargeable and when the order was made, a "widowed mother" within the meaning of s. 35 of 39 & 40 Vict. c. 61. (1)

The respondents contended that the settlement of the pauper was properly adjudged to be in the parish of Chesham, because on the death of her father she, being under sixteen years of age, became entitled to her widowed mother's birth settlement, which she retained, notwithstanding that her mother married again.

The Court were to be at liberty to draw inferences of fact.

The question for the opinion of the Court was whether the pauper was at the time of the making of the order of removal settled in the parish of Chesham in the appellant union.

W. Graham, (*Ashton*, with him) for the appellants. In considering the question of the settlement of the pauper she must not be treated as having gained a status before the order of removal was made, but the state of facts at that time must be looked at: *Reg.* v. *Bridgnorth* (2); *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (3); *Guardians of Kingsbridge Union* v. *Guardians of East Stonehouse*. (4) The pauper cannot take her father's settlement, for he is dead, and she cannot take her mother's, as the mother being now a wife is no longer a "widowed mother" within the meaning of s. 35 of the Divided Parishes Act, 1876: *Keynsham Union* v. *Bedminster Union* (5);

(1) "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(2) 11 Q. B. D. 314.

(3) 15 Q. B. D. 95.

(4) 18 Q. B. D. 528.

(5) 3 Q. B. D. 344.

1887

GUARDIANS OF POOR OF AMERSHAM UNION v. GUARDIANS OF POOR OF CITY OF LONDON UNION.

Guardians of Maidstone Union v *Guardians of Holborn Union* (1); *Guardians of Headington Union* v. *Guardians of St. Olave's Union.* (2) The pauper must therefore take her own birth settlement.

Poland, for the respondents. Admitting that the state of facts existing at the date of adjudication must be looked at, the order was right. It is clear that a child under sixteen with a father alive takes its father's settlement, while, if its only surviving parent be a widowed mother, the child takes her settlement, unless it is derivative. The decision in *Guardians of Croydon Union* v. *Guardians of Reigate Union* (3) shews conclusively that the pauper took her widowed mother's settlement up to the time of her second marriage, and by s. 35 she retains that settlement, the widowed mother's settlement being merely suspended, and not abolished, during her second marriage.

Graham, in reply. The contention for the respondents pays no attention to the circumstances at the time of the adjudication, but is founded on a state of facts existing years before; it overlooks the fact that at the date of adjudication the child has no "widowed mother."

STEPHEN, J. The difficulty in this case is caused by the faulty draughting of the section, the first and third parts of which stand in a very singular relation indeed to each other; the last part has very little meaning and seems to have been carelessly inserted. It is common ground between the parties that the period of time to be looked at in construing the section is the time at which the settlement of the pauper is being determined, and we must therefore look at the position of this child immediately before she became chargeable, and consider her for our purposes as having no settlement at that time. Now this child did not become chargeable until after the second marriage of her mother; at that time, the time when she became chargeable, she had no father, for he was dead, and she had no "widowed mother," for her mother had contracted a second marriage and was no longer a widow; we cannot look at any derivative settlement of the mother which might be set up, for the section forbids it; and

(1) 17 Q. B. D. 817. (2) 13 Q. B. D. 293.
(3) 19 Q. B. D. 385.

1887

GUARDIANS OF POOR OF AMERSHAM UNION v. GUARDIANS OF POOR OF CITY OF LONDON UNION

Stephen, J.

the only thing that we can look at is the child's own birth settlement. The argument for the respondents turns upon the notion that, although we are to look at the state of things at the time when the order of removal was made, we must yet consider what the child's settlement was at that time, and it is argued that she then had the settlement of her widowed mother, whatever that settlement might be. If this line of reasoning were followed out it would lead us to an opposite conclusion to that which we have formed; but I do not think, speaking for myself, that as soon as the father died the child took her widowed mother's settlement. I do not think she took any settlement at all until she actually become chargeable and the order of removal was made. There must be judgment for the appellants with costs.

A. L. SMITH, J. I am of the same opinion. The real question that we have to decide is whether the child takes her own birth settlement, or the birth settlement of her mother. The section is a most difficult one to construe, and has been the subject of many inquiries, but it is now absolutely settled that it must be construed with reference to the time at which the question for adjudication arises, not in the light of what has happened before, but of the state of things at the time of adjudication. At that time the child's father was dead; her mother was not a widow, but had married again, and the only settlements that could possibly be then existing were the derivative settlement of the married widow and the child's own birth settlement. But the section primâ facie abolishes derivative settlements in toto, though it subsequently creates the exceptions that have caused so much discussion; we cannot therefore inquire into the mother's derivative settlement, and we must fall back on the birth settlement of the child. I think that the argument for the respondents is wrong, for at the time of adjudication the "widowed mother" had no settlement; it was gone.

Judgment for the appellants.

Solicitors for appellants: *Allen & Edwards, for Bedford, Amersham.*

Solicitor for respondents: *Rexworthy.*

W. J. B.

[IN THE COURT OF APPEAL.]

1887
Nov. 29.

THE GLOUCESTERSHIRE BANKING COMPANY, LIMITED *v.* EDWARDS.

Sheriff—Under-sheriff—Death of Sheriff—Vacancy of Shrievalty—Liability of Under-sheriff for Proceeds of Execution—3 Geo. 1, c. 15, s. 8.

Where an under-sheriff (since deceased) acting as sheriff during the vacancy of the shrievalty under 3 Geo. 1, c. 15, s. 8, wrongfully retained the proceeds of an execution:—

Held (affirming the judgment of the Queen's Bench Division), that an action for money had and received was maintainable against the executor of the under-sheriff by the execution creditors to recover the sum so wrongfully retained. (1).

APPEAL from the order of the Queen's Bench Division (Day and Wills, JJ.) granting a new trial (19 Q. B. D. 575).

The facts are fully stated in the report of the case in the court below. For the purposes of this report it is sufficient to state them briefly as follows:—

The plaintiffs having recovered judgment in an action, a writ of fi. fa. was issued thereon, directed to the sheriff of the county of Monmouth, and placed in the hands of the under-sheriff. Certain goods were thereupon seized under the fi. fa. Afterwards the sheriff died, and before a new sheriff was appointed the goods so seized were sold by the under-sheriff, and the proceeds thereof were received by him. The under-sheriff paid over to the plaintiffs the balance of the proceeds of sale so received by him, after deducting certain sums for rent claimed by the execution debtor's landlord, and charges, expenses, &c. The plaintiffs, however, disputed his right to make certain of the deductions which he had made, and claimed that there was a balance still due to them in respect of the proceeds of the execution. The under-sheriff having since died, the plaintiffs brought an action against his executor, claiming for, amongst other things, moneys received by the defendant's testator for their use in respect of the proceeds of the execution so received

(1) See now the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 25.

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

by him during the vacancy of the shrievalty, and not paid over to them. Lord Coleridge, C.J., at the trial ruled that the action would not lie, and gave judgment for the defendant.

The plaintiffs applied to the Divisional Court for a new trial, which was granted. (1)

Cohen, Q.C., and *A. J. Ram*, for the defendant. The action is not maintainable. As long as the sheriff is alive, any action in respect of anything done or omitted to be done in the execution of his office must be against him, not against the under-sheriff, who is merely his deputy: *Longdill* v. *Jones*. (2) The under-sheriff has no duty except towards the sheriff. Before the Act 3 Geo. 1, c. 15, it is clear that after the death of the sheriff no liability could arise on the part of the under-sheriff towards the execution creditor; if the sheriff died after the execution was begun, but before it was completed, the representatives of the sheriff were bound to carry it through, and it would be the duty of the under-sheriff to pay over the proceeds of an execution to them, not to the execution creditor. It would appear from what Lord Mansfield said in *Cooper* v. *Chitty* (3), that he considered the law to remain the same after the statute of George I. When the high sheriff has seized under the fi. fa., he has contracted an obligation to complete the execution which passes to his representatives: *Doe* v. *Donston* (4); *Clerk* v. *Withers*. (5) The under-sheriff before the statute was not liable to an action in respect of irregularities in the execution of the office of sheriff: Watson on Sheriffs, 2nd ed., p. 38. He was only the sheriff's agent or deputy. It is contended that there is nothing in the

(1) 3 Geo. 1, c. 15, s. 8, provides that "if any high sheriff of any county of England or Wales shall happen to die before the expiration or determination of his year, or before he be lawfully superseded, in such case the under-sheriff or deputy-sheriff by him appointed shall nevertheless continue in his office, and shall execute the same and all things belonging thereunto in the name of the said deceased sheriff until another sheriff be appointed, &c.; and the said under-sheriff or deputy-sheriff shall be answerable for the execution of the said office in all things and to all respects, intents, and purposes whatever during such interval as the high sheriff so deceased would by law have been if he had been living," &c.

(2) 1 Stark. 345.

(3) 1 W. Bl. 65, at p. 69.

(4) 1 B. & Ald. 230.

(5) 6 Mod. 295.

statute to alter his position in this respect or to make him liable to execution creditors. All that the 8th section was intended to do was to enable him to continue to act, though the sheriff who had appointed him his deputy was dead. He may be answerable for what he does in the completion of an execution to those who represent the deceased sheriff, but they are responsible to the execution creditors. The under-sheriff is no more answerable to execution creditors after the death of the sheriff than he would have been if the sheriff were alive.

[LORD ESHER, M.R. The duty of the under-sheriff as such was to account to the sheriff, but, the sheriff being dead, in respect of what he does after the sheriff's death he is not acting as the sheriff's deputy, and he cannot account to him. From what words of the statute can be deduced a liability to account to the executors of the deceased sheriff?]

He receives the money to their use.

[LORD ESHER, M.R. That construction would make the executors of the late sheriff liable for his acts as if he were their deputy, though they did not appoint, and could not remove him.]

It is contended that the Act was not intended to impose upon him liabilities to which he would not have been subject if the sheriff had lived, but only to continue his former liability notwithstanding the death of the sheriff. The plaintiffs having sued in tort for negligence, extortion, and false return (1), causes of action which would be barred, the action not having been brought within six months after the defendant had taken upon him the administration of the testator's estate and effects, they ought not to be allowed alternatively to sue in contract for money had and received in respect of what are substantially the same matters.

[BOWEN, L.J. There is an entirely distinct claim for money had and received. The doctrine of electing to waive the tort and sue for money had and received applies to a case where goods are tortiously sold. The present case is not one of that sort.]

Bosanquet, Q.C., and *Gwynne James*, for the plaintiffs, were not called upon.

(1) See the pleadings and facts set out, 19 Q. B. D. 575.

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

LORD ESHER, M.R. In this case execution creditors sue the executor of an under-sheriff, shaping their action in the following way among others. They allege that the under-sheriff, in his lifetime, at a time when the sheriff who had appointed him was deceased and before a new sheriff was appointed, received money the proceeds of a writ of execution put into his hands in the lifetime of the sheriff, and that, having deducted charges and expenses which he was not entitled to deduct, he did not pay over to the plaintiffs so large a sum as he ought to have done. They therefore bring an action against the under-sheriff's executor to recover a balance of such moneys due to them; that is in substance an action for money had and received, inasmuch as the liability suggested arises from a duty to pay over the money as under-sheriff. The answer made on behalf of the defendant is that, assuming the facts alleged to be true, and that there is a balance of the proceeds of the execution still unpaid which ought to have been paid, the under-sheriff was not subject to any duty to pay it to the plaintiffs, his duty being to pay it to the executors of the high sheriff, and that therefore the action must fail. The reply on the part of the plaintiffs to that argument is, that by virtue of the 8th section of 3 Geo. 1, c. 15, there was a duty imposed on the under-sheriff to pay this money over to the plaintiffs, the execution creditors. The question therefore is whether that statute does impose such a duty as alleged upon the under-sheriff under the circumstances of this case. What other duties the Act may or may not impose on the under-sheriff under other circumstances we need not now determine. The under-sheriff was before the Act and is after it, as long as the sheriff is alive, merely in the position of the sheriff's deputy, appointed and removeable by him. In respect of irregularities committed by him as such deputy in the execution of his office, the liability to parties injured thereby would rest upon the sheriff by virtue of his office. On the death of the high sheriff, however, before the Act of Geo. 1, the office of the under-sheriff necessarily came to an end, because his deputation came to an end. What then might have been the duties of anybody else as to an uncompleted execution, and whether the executors of the sheriff were under any and what liabilities, it is, as it appears to me, not necessary

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

Lord Esher, M.R.

to consider; it is quite clear that the under-sheriff's functions had come to an end. If the executors of the sheriff were subject to any duties which they did not choose to perform themselves, they would have to appoint their own deputy to perform them: the under-sheriff could no longer act as under-sheriff appointed by the sheriff. If the executors of the sheriff chose to appoint him as their deputy, it would be as such he would act, not as the deputy of the deceased sheriff. The statute 3 Geo. 1, c. 15, recites that great inconveniences have arisen by the death of sheriffs during the term of their shrievalty, by which are meant inconveniences to execution creditors and other persons affected by the functions of the sheriff's office. The statute goes on to enact that "if any high sheriff of any county of England or Wales shall happen to die before the expiration or determination of his year or before he is lawfully superseded, in such case the under-sheriff or deputy sheriff by him appointed shall nevertheless continue in his office, and shall execute the same and all things belonging thereunto, in the name of the said deceased sheriff, until another sheriff shall be appointed for the said county and sworn in manner as hereinafter directed." If the section had stopped there, it might perhaps have been contended that the liabilities of the under-sheriff were no greater than before, and that he would not have been liable to execution creditors and others any further than he was in the sheriff's lifetime; but then, as it appears to me, the Act would have left the inconveniences caused by the death of the sheriff as great as before. The section, however, goes on: "and the said under-sheriff or deputy sheriff shall be answerable for the execution of the said office in all things and to all respects, intents, and purposes whatever during such interval as the high sheriff so deceased would by law have been if he had been living." No larger words could have been used. He is to be answerable not as an under-sheriff would have been, if the sheriff were alive, but as the deceased sheriff would have been, if he had been living. Instead of being answerable to the sheriff, as he would have been if the sheriff were alive, his position is altered, and he is to be answerable to the persons to whom the sheriff, if alive, would have been answerable. What is that in plain words but putting him in the

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

Lord Esher, M.R.

position of an interim high sheriff, not with regard to everything that the high sheriff had to do, but with regard to all things which ordinarily would be within the functions of an under-sheriff while the high sheriff was alive? Assuming the evidence, which can be produced by the plaintiffs, to support the claim they make, it seems to me that the sheriff, if alive, would have been liable to the plaintiffs in respect of the balance claimed; and therefore upon the plain words of the statute it seems to me that the defendant is so liable. If the executors of the high sheriff under such circumstances ever could have been made liable, speaking for myself, I am disposed to think that the liability of the under-sheriff is substituted for theirs by the statute, and they are no longer liable. For these reasons it appears to me that the judgment should be affirmed.

BOWEN, L.J. I agree substantially with what the Master of the Rolls has said. The action is for money had and received; and the claim, so far as concerns the present question, is for the proceeds of goods rightfully sold, and therefore for moneys rightfully received, but wrongfully detained in the hands of the under-sheriff. Therefore the case is not like that, where, the claim being for the proceeds of goods tortiously sold, the plaintiff waives the tort and brings an action for money had and received. There is no question of a tort; the suggestion is that the moneys were rightly received under such circumstances as that there was an obligation or duty on the part of the under-sheriff to pay them over to the execution creditors, for non-performance of which an action for money had and received, which is an action in contract, will lie. The whole question, therefore, is whether there was any such obligation or duty on the part of the under-sheriff towards the plaintiffs. The statute 3 Geo. 1, c. 15, was passed to remedy great inconveniences which arose from the death of sheriffs during their year of office, because, when the sheriff died, necessarily the under-sheriff ceased to be his deputy. It has been suggested to us on the authority of the case of *Doe* v. *Donston* (1), that there were occasions where the shrievalty having become vacant by the death of the sheriff, leaving an execution or

(1) 1 B. & Ald. 230.

such like duty partly performed, his executors were liable for the completion of that which he had begun. I do not think we have got to consider whether if so that is still the law after the statute 3 Geo. 1, c. 15, or whether the language attributed to Lord Mansfield in *Cooper* v. *Chitty* (1) is really an accurate statement of the law after that Act. I express no opinion on the point. My brother Fry has pointed out to us what is well worthy of notice, viz., that the words which are attributed in the report in Wm. Blackstone to Lord Mansfield appear in the report in Burrows (2) to have been merely quoted by him as being part of the argument of counsel. If we had to decide that question I think it would require further consideration. The question is whether the statute has imposed on the under-sheriff a duty towards the execution creditors. The language seems to me expressly to impose such duty. It says that the under-sheriff "shall be answerable for the execution of the said office in all things and to all respects, intents, and purposes whatever, during such interval, as the high sheriff so deceased would by law have been, if he had been living." That the construction we are putting on the 8th section is correct, seems to me to be shewn by the 11th section, which provides that the under-sheriff may appoint a deputy in case of the high sheriff's death, where he acts as high sheriff, thus clearly shewing that during the interval before the appointment of a new sheriff he exercises for the purposes of the statute the functions of the sheriff. It seems to me that the effect of the Act is that, if it would have been the duty of the sheriff if alive to pay over this money to the plaintiffs, it was the duty of the under-sheriff to do so, having received it during the period after the death of the sheriff while he was acting in the place of the sheriff. For these reasons I think the appeal should be dismissed.

FRY, L.J. I am of the same opinion. The sole question appears to me to be whether there was any duty on the part of the under-sheriff to pay over the moneys claimed to the plaintiffs. I cannot read the 8th section of 3 Geo. 1, c. 15, in any other way

(1) 1 W. Bl. 65, at p. 69.
(2) 1 Burr. 20, at p. 34.

1887

GLOUCESTERSHIRE BANKING CO. v. EDWARDS.

than as imposing such a duty. Therefore I think the judgment of the Queen's Bench Division should be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Meredith, Roberts, & Mills, for E. L. Wallis.*

Solicitors for defendant: *Johnston, Harrison, & Powell, for M. Edwards.*

E. L.

Nov. 29.

[IN THE COURT OF APPEAL.]

WITT *v.* BANNER.
SIMMONS, CLAIMANT.

Bill of Sale—Schedule—Inventory—Chattels "specifically described"—Sufficiency of Description—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.

By s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, every bill of sale must have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale, and is to be void, except as against the grantor, in respect of any personal chattels not specifically described in the schedule.

A bill of sale was given by a picture dealer with regard to (among other things, as to which no question arose) pictures, &c., forming stock-in-trade. Such bill of sale purported to assign "all and singular the several chattels and things specifically described in the schedule hereto annexed." The description in the schedule was, "At 47, Mortimer Street; four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames."

Held (affirming the judgment of the Queen's Bench Division), that the bill of sale did not comply with the requirements of the above-mentioned section, and therefore was void as against an execution creditor so far as chattels claimed under the above description were concerned.

APPEAL from the judgment of the Queen's Bench Division (Wills and Grantham, JJ.) (reported 19 Q. B. D. 276).

The facts were as follows:—

The decision in the Court below was on an appeal from the judgment of the judge of the Bloomsbury County Court on an interpleader issue in favour of the execution creditor. The question arose in relation to the title to certain pictures &c., which had been taken in execution. The execution debtor, who was a

picture dealer, executed a bill of sale dated December 24, 1886, with regard to (among other things as to which no question arose) pictures &c., forming stock-in-trade. The bill of sale purported to assign to the claimant "all and singular the several chattels and things specifically described in the schedule hereto annexed." The part of the schedule under which the goods in question were claimed by the claimant was as follows: "At 77, Mortimer Street, aforesaid: Four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames." The county court judge held that the pictures &c., included in the schedule were not "specifically described" so as to satisfy the requirements of the 4th section of the Bills of Sale Act (1878) Amendment Act, 1882, and, therefore, that in respect of those pictures &c., the bill of sale was void as against the execution creditor.

The Queen's Bench Division affirmed his judgment. (1)

Candy, Q.C., and *H. J. Broun*, for the claimant. The description of these pictures in the schedule was sufficient to satisfy the requirements of the Act. The intention was that such a description should be given as would enable the goods assigned to be identified. In order to constitute an "inventory" there need not be a catalogue of the goods with a description of every single article in detail. The fallacy of the argument on the other side is that it assumes that the legislature meant the description to be such that the article could be identified merely on the view without more. In every case parol evidence must be necessary to identify the subject-matter. It is sufficient if the description renders the thing assigned capable of identification, i.e., if with the aid of parol evidence it is sufficient to identify the thing assigned by the bill of sale. If more than this be required, where

(1) The Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 4, provides: "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale: and such bill of sale, save as hereafter mentioned, shall have effect only in respect of the personal chattels specifically described in the schedule, and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

1887

WITT v. BANNER.

can any line be drawn with regard to the particularity of description required? Suppose for instance the assignment was of sheep or any other things incapable of a very particular description. It would be impossible to describe them more particularly than as so many sheep of a particular kind; it would then be a matter of parol evidence to identify the particular sheep.

[LORD ESHER, M.R. Must there not to satisfy the statute be an inventory as specific as is usual in such documents having regard to the subject-matter?

BOWEN, L.J. Would any broker's man call a document of this kind an inventory, where he was dealing with hundreds of pictures forming a dealer's stock-in-trade?]

It is contended that this may fairly be called an inventory for the purposes of the statute.

[They cited *Roberts* v. *Roberts*. (1)]

[FRY, L.J. There is nothing to shew that this was the whole stock-in-trade on the premises, and, if it were, it is immaterial, for the bill of sale does not describe it as such.]

Channell, *Q.C.*, and *W. Thornton Sharp*, for the execution creditor. The object of the statute was to facilitate the identification of the goods assigned, where there were other goods of the same description on the premises. The case of *Roberts* v. *Roberts* (1) was altogether different. Where the assignment was expressed to be of all the horses, cattle, &c., and farming stock on certain premises, it might be quite sufficient to say in the schedule, two cart-horses, two cart-mares, &c. So, if it were a question of assigning pictures forming part of the furniture of a house, it might be sufficient to give some such description as, four oil-paintings in dining-room. The particularity necessary must depend on the circumstances and the subject-matter. This is an assignment of a large number of pictures forming the stock or part of the stock-in-trade of a dealer, which fluctuates from day to day: there is no evidence and nothing to shew that it was an assignment of all the stock-in-trade which he had on the premises at the time: and, if it was, the bill of sale does not so describe it. It seems obvious that this description only covers part of the stock-in-trade, or is merely an estimate of the amount

(1) 13 Q. B. D. 794.

1887

WITT v. BANNER.

of the whole, for the figures given are all round numbers. Such a description as this would let in the very mischief against which the legislature intended to guard. The description might be applied to any picture seized in execution, and the execution creditor is not given any means of judging to which pictures the bill of sale applies. Supposing a person were sent to take an inventory of stock-in-trade for the purpose of distinguishing between existing stock and what might be acquired afterwards, could he be said to have performed his commission if he brought back such a document as this schedule? A "specific" description must be opposed to a "general" description. What would be a general description, if this is not? If there were four hundred and fifty other pictures on the premises, how does this bill of sale help any one to say which of the pictures were intended to be assigned.

Candy, Q.C., in reply.

LORD ESHER, M.R. I confess that I do not think that anyone has succeeded in giving a better definition of what is required by the 4th section of the Bills of Sale Act, 1882, than was given in *Roberts* v. *Roberts*. (1) I certainly must say that I do not agree with what was said by Grantham, J., in the Court below on this subject, where he says, "looking at the meaning of the word 'specifically,' it is derived from species, and primâ facie one would be inclined to think that it would be enough to state the species." The words "specifically described" are used in the section in connection with the word "inventory," which must mean an "inventory" in ordinary business parlance. The section is not looking to philosophical or dictionary meanings of the term "specifically." It is a business section dealing with business matters, with schedules to bills of sale, documents well known to business men, and "inventories" as applicable to matters described in bills of sale.

The section first of all provides that every bill of sale shall have a schedule annexed thereto containing an "inventory" of the chattels comprised in the bill of sale. An "inventory" is a well-known business term. Then the goods must be "specifically

(1) 13 Q. B. D. 794.

1887

WITT v. BANNER.

Lord Esher, M.R.

described" in the schedule. That must mean that they are to be as specifically described as is usual in such inventories as are usually made for business purposes with regard to the particular subject-matter. If the assignment relates to stock-in-trade, the inventory must be such and the goods must be so specifically described therein as would be usual according to the ordinary mode of making an inventory of stock-in-trade at the place where the stock-in-trade is situated. I do not see how it is possible to get any closer description of what is required than that, and we must apply this business description of a business thing to the facts of this case in order to see whether the description of the goods here given is sufficient. I am not sure whether in such a case, if tried before a jury, the judge might not ask the jury whether such a description was an "inventory" in the business sense. Here the county court judge was judge both of law and fact. I cannot see that he decided wrongly on either. I am of opinion that the description of the goods in question in the schedule to this bill of sale was not such as to amount to an inventory in ordinary business parlance. I should be disposed to say that it would not be such an inventory, even if the things mentioned in it were all the things in the grantor's shop. It is not what any business man would call an inventory. It is not however stated that the things assigned are all the things in the shop. Even if it could be called an inventory in some sense, it is not an inventory which describes the goods therein as specifically as is usual in inventories of stock-in-trade. For these reasons I think the judgment of the Court below should be affirmed, and this appeal be dismissed.

BOWEN, L.J. I also think that the appeal must be dismissed. The first question is whether there is, so far as the goods in question are concerned, an inventory in the schedule to this bill of sale of the personal chattels comprised therein. If there is no inventory in the true sense of that term as used in the Act, cadit quæstio, for, if so, there can be no specific description of goods in an inventory. We have, therefore, to see first whether there is an inventory, and, if there is, then afterwards to consider whether the chattels are specifically described. It is necessary in

considering those questions to look at the circumstances of the case, the nature of the premises with the contents of which the bill of sale deals, and the nature of the subject-matter of the assignment, and then to ask oneself whether the document which is supposed to be an inventory is one within the ordinary meaning of that term as applied to such a transaction and such a subject-matter. It is sufficient for me to say, without attempting to give anything in the nature of a definition, that I agree with the view taken by the Master of the Rolls in *Roberts* v. *Roberts* (1) as to the meaning of the requirements of the Act. It is to be observed in dealing with this case that the bill of sale does not purport to assign all the goods or stock-in-trade then being on certain premises. The assignment is of "all and singular the several chattels and things specifically described in the schedule hereto annexed," and when we look to the schedule the description given is "four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames." In no sense, I think, can this document be said to contain an inventory of stock on a picture dealer's premises, seeing that it only purports to assign so many pictures or other articles on the picture dealer's premises without identifying the particular pictures, &c., which are assigned. If there is no inventory there can be no specific description of the chattels in an inventory. In order to comply with the requirements of the statute it seems to me that there must be a list of the articles in which they are specifically described with the particularity sufficient for the ordinary purposes of business having regard to the nature of the subject-matter.

FRY, L.J. I am of the same opinion. The 4th section of the Act requires two things; first, an inventory; secondly, that such inventory shall contain a specific description of the articles assigned. I do not think that there is in this case any inventory at all. Such a general and vague description as is contained in the schedule to this bill of sale is not what is generally understood by the term "inventory." Even if that were not so, I do

(1) 13 Q. B. D. 794.

1887

WITT v. BANNER.

Fry, L.J.

not think that there is any specific description of the chattels. I will not undertake to say what in all cases would be requisite to constitute a specific description. What would be a specific description as applied to a particular subject-matter under particular circumstances might not be a specific description if the subject-matter or the circumstances were different. I agree with what Wills, J., said in the Court below as to the meaning of the term "specifically." He said, "it can hardly be satisfied without something in the nature of description which helps to separate the thing described from the rest of the things of the same class: it is not satisfied by words which will answer just as well for any other things of the same sort and equal in number." For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for claimant: *Nordon & Lazarus.*

Solicitors for execution creditor: *Allen & Sons.*

E. L.

Nov. 11.

[IN THE COURT OF APPEAL.]

SCOTT *v.* MORLEY.

Husband and Wife—Married Woman—Judgment Debt—Order of Committal—Jurisdiction—Judgment limited to Separate Property—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5—*Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1 (2).

Under s. 5 of the Debtors Act, 1869, there is no power to commit to prison a married woman for her default in paying a sum for which judgment has been recovered against her by virtue of s. 1, sub-s. (2) of the Married Women's Property Act, 1882.

The proper form of judgment against a married woman under s. 1, sub-s. (2) of the Married Women's Property Act, 1882, settled by the Court.

APPEAL by Julia Morley, the wife of Samuel Morley, against an order made by Kekewich, J., sitting as vacation judge, upon a judgment summons, that she should be committed to prison for six weeks for non-payment of 291*l.* 11*s.* 9*d.*, the amount of the plaintiff's judgment debt and costs.

The action was brought in the Queen's Bench Division against

Samuel Morley and Julia Morley, his wife, by a creditor of the wife in respect of a debt contracted by her while she was a married woman. The writ was not served on the husband. The wife appeared to the writ, and on April 7, 1886, an order was made in chambers giving the plaintiff leave to sign judgment under Order XIV. r. 1, for the amount indorsed on the writ, with interest and costs, unless the amount of the plaintiff's claim should be paid into Court on or before the 15th of April, 1887, or security given within that time. The order directed that execution should be limited to the separate estate of the wife not subject to any restraint on anticipation, unless, by reason of s. 19 of the Married Women's Property Act, 1882, such estate should be liable to execution notwithstanding such restraint.

The wife did not within the time limited either pay the amount into Court or give security for the same, and the plaintiff signed judgment against the defendant for 278*l.* 8*s.* 9*d.*, and 13*l.* 3*s.*, the amount of his taxed costs, making together 291*l.* 11*s.* 9*d.*, execution being limited as above stated.

Henry Kisch, and *Clavell Salter*, for the appellant. There is no power under s. 5 (1) of the Debtors Act to commit a married woman to prison under a judgment in the form of the present judgment: *Meager* v. *Pellew* (2) (per Lord Esher, M.R., at p. 976); *Draycott* v. *Harrison*. (3) The judgment which is recovered against a married woman by virtue of sub-s. 2 of s. 1 (4) of the

(1) Sect. 5 provides that "subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court."

(2) 14 Q. B. D. 973.

(3) 17 Q. B. D. 147.

(4) Sect. 1 (2): "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

1887

SCOTT v. MORLEY.

Married Women's Property Act, 1882, imposes on her no personal liability to pay the debt. It is only a judgment for payment out of her separate property. There is under it no "debt due" from her within the meaning of s. 5 of the Debtors Act, and that section has no application. The judgment can be enforced by means of execution against the separate estate, or by the appointment of a receiver.

Herbert Reed, and *F. Cooper Willis*, for the judgment creditor. At common law a married woman was liable to be arrested under a ca. sa., when she had pleaded coverture and had failed to prove her plea, or when she had omitted to plead it, and if she was arrested the Court would release her unless she had separate property from which she could pay the debt: *Ivens* v. *Butler* (1); *Edwards* v. *Martyn*. (2) In *Poole* v. *Canning* (3) a married woman was sued as a feme sole for goods sold and delivered; she pleaded coverture, but offered no evidence at the trial in support of her plea. She was arrested under a ca. sa. on the judgment, and the Court held that she was not entitled to her discharge. In *Dillon* v. *Cunningham* (4) it was held that an order for payment could be made against a married woman under s. 5 of the Debtors Act, but coverture had not been pleaded in that case.

In order that s. 5 should apply it is not necessary that there should be a debt in respect of which an action could be brought; it is sufficient if there is a sum due upon a judgment of a Court: *Linton* v. *Linton* (5). In the present case the judgment is recovered against the wife, though execution is limited to her separate estate. The judgment goes further than that in *Pike* v. *Fitzgibbon* (6); it is not limited to separate estate existing at the time when the contract was made and remaining at the time of the judgment. If since the judgment the appellant has had separate property, and has not paid the debt out of it, she has disobeyed the judgment of the Court. In *Draycott* v. *Harrison* (7) the married woman was restrained from anticipation; it is admitted that there is no such restraint in the present case. In *Newton* v. *Boodle* (8) it was held that where there was a judg-

(1) 7 E. & B. 159, 162.
(2) 17 Q. B. 693.
(3) Law Rep. 2 C. P. 241.
(4) Law Rep. 8 Ex. 23.
(5) 15 Q. B. D. 239.
(6) 17 Ch. D. 454.
(7) 17 Q. B. D. 147.
(8) 9 Q. B. 948.

ment against a husband and wife for costs in an action brought by them jointly, a ca. sa. for the costs against both was regular. In that case *Roberts* v. *Andrews* (1) and *Anon.* (2) were referred to.

Before the Married Women's Property Act, 1882, the separate property of a married woman could be made available in equity to satisfy her engagements.

[FRY, L.J. I do not think she could have been attached for contempt if she had not paid out of her separate estate a sum which had been charged upon it by a decree of a Court of Equity.]

If she was in receipt of a separate income the Court would have compelled her to pay. Sub-s. 2 of s. 1 of the Married Women's Property Act, 1882, provides that a married woman "shall be capable of rendering *herself* liable to the extent of her separate property on any contract." She is made personally liable—i.e., a debtor—to the extent of her separate property. If she can only bind her separate property, the Act has not enabled her to do anything which she could not have done before.

Since the Judicature Act it is a mere matter of procedure whether the remedy is at law or in equity. The judgment against a married woman under sub-s. 2 of s. 1 of the Married Women's Property Act, 1882, is against her personally, though execution is limited to her separate property; *Conolan* v. *Leyland* (3); *Bursill* v. *Tanner* (4); *Turnbull* v. *Forman.* (5)

Clavell Salter, in reply.

LORD ESHER, M.R. I will consider first what was the liability of a married woman before and up to the coming into operation of the Married Women's Property Act, 1882. At common law as regarded a contract made by a woman before her marriage, but which was not sued upon till after her marriage, she and her husband were sued together, and, if it was proved that the contract on which the action was brought had been made by the wife before marriage, the judgment went against both husband and

(1) 2 W. Bl. 720.
(2) 3 Wils. 124.
(3) 27 Ch. D. 632.
(4) 13 Q. B. D. 691.
(5) 15 Q. B. D. 234.

1887

SCOTT v. MORLEY.

Lord Esher, M.R.

wife, and the execution followed the judgment. In those days one mode of execution was by a capias ad satisfaciendum, and the writ went against both husband and wife, so that the wife could be taken in execution to satisfy the judgment. Under certain circumstances—if it was proved that the wife had no separate property—the Court was enabled to deal with a wife in a different way from that in which they dealt with the husband; the Court could not deal with him at all. But the wife was liable to be taken under a capias in respect of a contract entered into by her before marriage. During marriage a woman could not legally enter into any contract, without the authority of her husband, and no action could be maintained upon such a contract against her and her husband. If during marriage she entered into a contract without the authority of her husband there was no remedy in respect of it; if she entered into a contract with his authority it was his contract alone, and he alone could be sued upon it. Again, if a wife during marriage committed certain torts, she could be sued in respect of them jointly with her husband; she could be sued on the ground that she had committed the wrong, and he on the ground that he had permitted her to do so. But the judgment went against both husband and wife, and, as the execution followed the judgment, the wife could be taken under a capias. But at common law, in respect of a contract made by a woman during marriage, there was no remedy; in other words, there was no legal liability upon her. In equity, however, a decree could be obtained upon such a contract, but only when the woman had separate property, and the decree was in the form of a declaration that her separate estate was chargeable with the amount due on the contract. That is to say, in equity the creditor could obtain an order charging the woman's separate estate, but the order did not render her liable to be taken in execution. Therefore, up to the time of the coming into operation of the Married Women's Property Act, 1882, a married woman could be taken in execution upon a judgment recovered after her marriage against her and her husband in respect of a contract made by her before marriage, and also upon a judgment recovered against her and her husband in respect of a wrongful act done by her during the marriage. But neither at law nor in

1887

SCOTT v. MORLEY.

Lord Esher, M.R.

equity was she liable to be taken in respect of a contract made by her during marriage. It seems to me that the Act of 1882 does not alter the legal liability of a married woman at all. It does not prevent the bringing of an action against a husband and wife in respect of a contract made by the wife before marriage, and it does not affect the case of a wrongful act committed by a woman during marriage, and, where at common law a married woman was liable to be taken under a capias ad satisfaciendum, in such cases she can now be summoned under s. 5 of the Debtors Act, 1869, and be dealt with accordingly.

But then arises the question, what is now the position of a married woman in respect of a liability to which she was not subject at common law, but which has been imposed on her solely by the Married Women's Property Act, 1882? The liability is imposed by sub-s. 2 of s. 1 of that Act, which provides that "a married woman shall be capable of entering into and rendering herself liable on any contract."

That must mean that a woman shall after she is, and whilst she is married, be capable of entering into and rendering herself liable upon any contract. She could enter into a contract before the Act, and therefore the Act must mean that she shall be capable of entering into a contract so as to render herself liable upon it. A liability is thus imposed on her which did not exist either at law or in equity before the Act. If sub-s. 2 had stopped there, I should have thought that the same consequences would follow as in the case of a contract entered into by a feme sole. If no remedy were given by the Act for a breach of the contract, the remedy must be that common law remedy which is applicable to the case. But, if a remedy is given by the statute which imposes the new liability, that must be the only remedy. Sub-s. 2 goes on to provide that the woman shall be capable of rendering herself liable "in respect of and to the extent of her separate property," and "of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her" (that again alters the law); "and any damages or costs recovered against her in any such

1887

SCOTT v. MORLEY.

Lord Esher, M.R.

action or proceeding shall be payable out of her separate property, and not otherwise."

That is, the damages recovered are not to be payable by the married woman; they are to be payable out of her separate property. It seems to me that the judgment in such an action ought to follow the words of the Act. The damages to be recovered are to be payable out of the woman's separate property, or they are to be recovered against her, but are to be payable only out of her separate property. This section really imposes a new liability on a married woman at law, which will produce the same result as was before the Act produced in equity. In equity the decree was that the sum found due should be charged on the married woman's separate estate, and the same effect is, as it seems to me, given by the Act to an action at law as was before the Act produced in equity by a different process.

If this be so, does s. 5 of the Debtors Act, 1869, apply to a judgment of this nature? Sect. 5 says that the Court may commit to prison any person who makes default in payment of "any debt due from him" in pursuance of any order or judgment of the Court. What is the real meaning of those words "due from him"? It appears to me that they point to a debt which the defendant is personally liable to pay. If you treat the Debtors Act as an Act which authorizes the Court to commit people to prison, then you must construe it strictly. It is a highly penal Act, affecting the liberty of the subject, and you must not say that a sum which is payable only out of a person's property is a sum "due from" that person. If, on the other hand, you treat the Act as a remedial Act, then it only enables the Court to modify the imprisonment which could have been inflicted at common law, so as to prevent it from being so large as it was at law before the Act; and, treating the Act in that way, s. 5 cannot apply to such a case, because there was nothing to modify, there being no power to arrest a married woman before the Act. If it is treated as a penal Act it must not be stretched. In either view of the Act, it appears to me that s. 5 of the Debtors Act does not apply to the judgment which can be recovered against a married woman only by virtue of the Married Women's Property Act, 1882. On these grounds I agree with the decision in

1887

SCOTT v. MORLEY.

Lord Esher, M.R.

Draycott v. *Harrison* (1), though not with all the reasons given by the learned judges.

I desire to repeat that our present decision applies merely to judgments which can be recovered against a married woman only by virtue of the Act of 1882, and that it does not apply to judgments which could have been recovered against a married woman at common law before that Act.

The order of Kekewich, J., was wrong, and it must be discharged. But it appears that the question of jurisdiction was not argued before him.

BOWEN, L.J. I am of the same opinion. I will begin by saying that we are now deciding that a married woman cannot be committed upon a judgment summons under s. 5 of the Debtors Act, 1869, for non-payment of a sum for which judgment has been recovered against her in an action brought strictly under sub-s. 2 of s. 1 of the Married Women's Property Act, 1882. We say nothing as to any other judgments which can be recovered against a married woman. The power of committal given by the Debtors Act is, I do not say equivalent to, but it is more or less a substitute for the old process of capias. Suppose that there had been no Debtors Act, and that the Act of 1882 had been passed enabling a married woman to be sued and judgment to be recovered against her, subject to the limitations contained in sub-s. 2 of s. 1, would a judgment so obtained have justified the arrest of a married woman under a capias? As a general rule a writ of capias followed the judgment; it was the fruit of the judgment. At common law therefore, when a judgment had been regularly obtained against a married woman, a capias could be issued against her on the judgment. It is plain from the cases of *Beynon* v. *Jones* (2) and *Newton* v. *Boodle* (3) that the capias followed the judgment. And, even in a case in which a married woman could, if she had pleaded coverture, have escaped liability, but she omitted to plead it, or in which, having pleaded coverture, she allowed judgment to go against her by default upon her plea, she could not be heard to complain if she was

(1) 17 Q. B. D. 147. (2) 15 M. & W. 566.
(3) 9 Q. B. 948.

1887

SCOTT v. MORLEY.

Bowen, L.J.

arrested under a capias upon the judgment. A limitation was, however, in the course of time imposed on this somewhat stern view of the liability of a married woman to this extent, that, if she was sued with her husband, and they were both arrested under a capias, and it then appeared that she had no separate property, the Court would as a matter of indulgence discharge her. The cases of *Edwards* v. *Martyn* (1) and *Larkin* v. *Marshall* (2) are authorities for this proposition. But they also shew that at common law a married woman could be taken under a capias upon a judgment recovered against her husband and herself. We must have regard also, in considering this particular part of the argument, to the position of a married woman in equity at the time when the Act of 1882 was passed with respect to engagements into which she had entered. In equity her separate estate could be made available by way of charge to satisfy those engagements.

But it appears to me that, when the Act of 1882 gave to a married woman a legal capacity of entering into contracts, it was intended to limit the extent of her liability upon them, and the question is, to what extent it is limited. Sub-s. 2 of s. 1 says that a married woman shall be capable of "rendering herself liable in respect of and to the extent of her separate property on any contract." It appears to me that those words, taken in their natural sense, do not create any personal liability; they only subject the married woman to a proprietary liability. I think that a judgment recovered against a married woman by virtue of those earliest words would not subject her to a personal liability as distinguished from a liability in respect of property. Then sub-s. 2 goes on to say that she shall be capable "of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or taken against her." This makes a considerable alteration in the mode of legal procedure by or against a married woman. Finally, we come to the result of the suit, that which the plaintiff is to take under his judgment, "any damages or costs recovered against her in any such action or

(1) 17 Q. B. 693. (2) 4 Ex. 804.

proceeding shall be payable out of her separate property, and not otherwise." The only means of satisfaction of the judgment there indicated are to be found in her property, not in her person. This limited power for a married woman to render herself liable upon a contract, in respect of her separate property, and that only, is the creation of the statute, and, just as sub-s. 2 begins with enabling her to render herself liable in respect of her separate property only, so it ends by saying that the creditor is to obtain satisfaction out of her separate property, and not otherwise. Such a judgment is not like a judgment for a debt at common law, and it seems to me, therefore, that, if the Debtors Act had not been passed, it would not have given the creditor any right to take the woman's body in execution.

Then arises the question, whether, after writs of capias were abolished, s. 5 of the Debtors Act gave the judge power to commit the defendant to prison for her default in paying the judgment debt? Of course the legislature is omnipotent, and might extend in any way the power of committing judgment debtors, though, having regard to the course of modern legislation, it is not likely that it would do so. But it is not unimportant to remember that the Married Women's Property Act, 1882, had not been passed at the time when the Debtors Act was passed, so that there is no ground for supposing that the latter Act was passed with a view to the former, though of course the words of s. 5 of the Debtors Act might be large enough to include judgments against married women under the Act of 1882. What, then, is the language of s. 5? I desire to express my adherence to the large view of the construction of such an Act which has been adopted by the Master of the Rolls. When an Act is dealing with the liberty of the subject we ought to be very careful not to read into it words which are not to be found there, and which would derogate from the liberty of the subject. Now s. 5 gives power to commit a person who makes default in payment of any debt "due from him." Can it be said that, when a judgment directs a sum to be paid out of a married woman's separate property, it creates a debt "due from her," as to which she can make default in payment? In my opinion, if

1887

SCOTT v. MORLEY.

Bowen, L.J.

we were so to hold, we should be straining the language of s. 5. The debt under such a judgment is only "due from" the married woman sub modo; it is only payable out of her separate property. This is enough to determine the present case.

I say nothing about judgments which could be recovered against a married woman at common law; I limit my decision to judgments which can only be recovered by virtue of the Act of 1882.

I think that the judgment in the present case has been in substance drawn up with a true view of the effect of sub-s. 2, though I think it is not exactly right in form. In my opinion the judgment ought to follow the words of the Act, and, if my learned colleagues concur with me, I think that this will be a convenient opportunity for us to indicate what would be the right form of the judgment in such a case.

FRY, L.J. The question which we have to determine was not decided by the learned judge, for the point was not really raised before him.

The question is, can a married woman be committed to prison under s. 5 of the Debtors Act, 1869, for her default in paying a sum for which judgment has been recovered against her under sub-s. 2 of s. 1 of the Married Women's Property Act, 1882? I will consider first how matters stood in the year 1869. In that year a married woman could in certain cases be taken under a ca. sa. issued upon a judgment at common law. Whether she was also liable to be taken under a writ of attachment in equity is not quite clear. But, in whatever mode she was liable to be taken before the Debtors Act, 1869, such liability was abolished by that Act, with certain exceptions, one of which is contained in s. 5. In all those cases, however, in which she could have been taken under a ca. sa. before the Debtors Act, she was liable to be committed after that Act came into operation. By s. 5 a general discretionary power of committal is substituted for the old method of arrest under a ca. sa. But before the Act of 1869 the defendant could not have been arrested for the debt in respect of which judgment has been recovered against her. She could not

have been arrested at law, because there could have been no legal debt due from her, and she could not have been arrested in equity because the form of the decree which charged her separate estate gave no relief against her personally. She could not, before the Act of 1869, have been arrested for such a debt either at law or in equity, and therefore she could not, after the Act, be committed under the substituted discretionary power.

What, then, has the Act of 1882 done? It has given to a married woman the capacity of contracting, and rendering herself liable in respect of and to the extent of her separate property, and of suing and being sued, either in contract or in tort, as if she were a feme sole, but the subject-matter in respect of which damages can be recovered against her is limited to her separate estate—the damages are to be payable "out of her separate property, and not otherwise." If the Act of 1882 had been passed before the Act of 1869, could a ca. sa. have been issued against a married woman upon such a judgment? In my opinion, it could not, and for this simple reason, that the judgment is limited to a particular fund, and creates no general personal liability.

But, whether a ca. sa. could or could not have been issued against a married woman upon such a judgment, if the Act of 1882 had been passed before the Act of 1869, it appears to me that a judgment against a married woman under the Act of 1882 does not give rise to any power of committal under s. 5 of the Act of 1869. The power of committal given by s. 5 applies only when there is a "debt due from" the defendant, and a debt which is recoverable only out of the separate property of a married woman cannot be said to be a debt "due from" her.

But I think it would be wrong not to put our decision on the broader ground, that those who ask the Court to commit a person to prison are bound to shew the jurisdiction to do so. In the absence of clear words to that effect, it must not be assumed that the legislature have created a new power of committal. It appears to me that the object of the legislature in the Act of 1882 was to facilitate the recovery of debts out of the separate property of married women, and not to enlarge the then existing power of committal for debt.

Appeal allowed.

1887

SCOTT v. MORLEY.

Nov. 12. Their LORDSHIPS stated that, in their opinion, a judgment against a married woman under s. 1 (2) of the Act o 1882 ought to be in the following form:—

"It is adjudged that the plaintiff do recover £—— and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless, by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."

Solicitors: *Edward Le Voi; F. Scott.*

W. L. C.

Nov. 17.

THE QUEEN *v.* POULTER AND OTHERS.

Compensation—Railway—Railway Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 6, 16 *—Lands injuriously affected—Termination of Interest of Claimant—Prospective Damage.*

A railway company commenced to build warehouses which were intended to be 100 feet in height. The lessee of a warehouse the light of which would be affected when the buildings were completed gave notice to the railway company that he held on a lease for an unexpired term of fourteen years, which could be determined by six months' notice, to expire on November 11 then next, and required the company to determine whether they would take over the lease, or whether he should give the requisite notice. The company declined to interfere, and the lessee on May 6 gave notice to determine his tenancy. There was no evidence that at that time the building had progressed so far as to affect the light to the warehouse. Afterwards the lessee gave notice to the company of his claim for compensation for injuriously affecting his lands, and an inquiry was held before the sheriff and a jury:—

Held, reversing the judgment of the Queen's Bench Division, that the act of the lessee in giving notice to terminate his lease, not being the natural result of the acts of the railway company, but a free exercise of will on his part, he could not recover compensation on the footing that he was entitled to a fourteen years' lease:—

Held, also, that the claimant could not recover compensation in respect of an injury which was merely prospective and which did not exist at the time of making the claim.

THIS was a rule calling on Thomas Poulter and others to shew cause why a writ of certiorari should not issue to remove into the Queen's Bench Division an inquisition, verdict, and judgment taken before the under-sheriff of Middlesex, touching a claim

1887

THE QUEEN v. POULTER.

to compensation in respect of lands injuriously affected by the execution of works of the London, Tilbury, and Southend Railway Company.

The London, Tilbury, and Southend Railway Company, by their Acts, were authorized to acquire land in the parishes of St. George's-in-the-East and St. Mary, Whitechapel, for the purposes of their railway, and to erect warehouses and other buildings upon such lands. The company accordingly acquired certain lands in Lambeth Street, and commenced to build warehouses which were, when completed, to be about 100 feet high.

The claimants, Messrs. Poulter, were lessees of warehouses in Lambeth Street, immediately fronting the site of the company's warehouses, and in April, 1886, they pointed out to the company, through their solicitor, that the erection of the warehouses would seriously affect their premises by diminishing the light and air, and would render it impossible for them to carry on their business there. The attention of the company was drawn to the fact that the lease under which Messrs. Poulter held their premises was terminable on November 11, 1886, on giving six months' notice, in default of which it would continue for fourteen years more and the company were asked whether they desired, in view of the fact of their having to pay compensation, to take an assignment of the lease instead of leaving it to be terminated by notice. The company declined to take any steps in the matter, and Messrs. Poulter, on May 6, 1886, gave notice to terminate their tenancy on November 11 following. On September 14, the company were served with a notice of claim under s. 68 of the Lands Clauses Act, 1845, in respect of the injurious affection of Messrs. Poulter's lands and premises and their interest therein, and for trade loss and damage sustained or to be sustained, and a sum was named as compensation. The schedule to the claim described the warehouses as held under a lease dated March 3, 1884, for the term of seventeen years, from November 11, 1883, determinable by the lessees at the end of the first or third year thereof by six calendar months' previous notice, and at the yearly rent of 425*l.*

The company did not agree to the terms proposed, and a jury was accordingly summoned, and an inquiry held before the sheriff

1887

THE QUEEN v. POULTER.

of Middlesex on November 8 following. At this inquiry the claimants gave in evidence that they had taken new premises at a higher rental, and had incurred expense in removal and damage to their business. Several questions were raised, but the only one that it is necessary to notice in this report is the question whether the claimants were entitled to claim in respect of any damage except such as they would have sustained before the termination of their tenancy on November 11, no objection being raised to the assessment of prospective damages up to that date. The jury returned a verdict for 3000*l.*, or in the alternative for 450*l.*, on the assumption that the claimants were not entitled to claim beyond November 11. The inquisition was accordingly drawn up in the alternative.

A rule nisi for a writ of certiorari was obtained in the Queen's Bench Division, which on argument was discharged with costs. The company appealed.

R. S. Wright, (*Sir R. Webster, A.G.*, and *C. Haigh*, with him), in support of the appeal. The claimants can only obtain compensation on the same footing as that on which they would have recovered damages, and as their interest terminated on November 11, they could not have recovered damages except for their loss up to that date.

[He was stopped.]

Moulton, Q.C., and *G. M. Freeman*, for the respondents. The effect of the company's buildings would be to injure the claimants' easement of light and air, and to render it very difficult, if not impossible, for them to carry on their business there. As prudent men, therefore, they were bound, in the interest of all parties, to give the notice, and what they now claim is the damage so caused to them by reason of the difference between the 425*l.* they would have paid under their lease for the next fourteen years, and the larger rent that they are forced to pay elsewhere during that period. If the claimants had not given notice to terminate their lease they would have claimed further the difference between the 425*l.* a year and the diminished value of the premises arising from the works of the company. This they cannot now claim, and if the landlord can do so, there is no

hardship on the company in the whole claim being divided. What the works of the company have injured is the interest of the claimants in a fourteen years' lease, and for that they ought to pay compensation. *Caledonian Ry. Co.* v. *Lockhart* (1) and *Croft* v. *London and North Western Ry. Co.* (2) shew that compensation for the prospective damage could be recovered. (3)

R. S. Wright, in reply.

LORD ESHER, M.R. In this case the claimants were lessees of a manufacturing building for a term which would extend fourteen years beyond November 11 then next, but with power to give notice which would put an end to the lease at that date. The railway company obtained an Act which either obliged or enabled them to build warehouses very much higher than certain existing buildings, and so placed that it was inevitable that when they were completed they would obstruct the claimants' light, and considering the business they were carrying on, would prevent them or any one else carrying it on at that place. I certainly think that there is no evidence to shew that at the beginning of May the railway company had so far carried out their works as to interfere with the existing lights. The claimants proposed, under these circumstances, that the railway company should take over the remainder of the lease of fourteen years, and stated that if the company did not accede to that proposition they should take their own course. The railway company did not accede, and declined to give any opinion whatever. Thereupon the claimants gave notice to their landlord to put an end to the lease on November 11 following.

Now if at that time no injury had been done to the claimants, I cannot understand how it can be suggested that they could claim in respect of an existing lease for fourteen years, but supposing there was some injury, which I do not think there was, even in that case, on May 6 the claimants gave the notice to their landlord, and the moment they had done so their lease, instead of being one for fourteen years, was one to end on November 11.

(1) 3 Macq. 808.

(2) 32 L. J. (Q.B.) 113.

(3) The arguments on the other points raised are omitted.

1887

THE QUEEN v. POULTER.

Lord Esher, M.R.

Whether, in point of fact, before September there was any injury done, we must take it there was some injury done at the time the notice of claim was given. Then the case went before the sheriff and a jury to determine what compensation the claimants were entitled to, and an alternative verdict has been found, one branch of which is on the footing that the claimants were entitled to a fourteen years' lease. The alternative verdict was on the assumption that, in respect of the same heads of damage they were only entitled to be treated as lessees of a lease ending on November 11. Now it seems to me unnecessary to determine whether the heads of damage were such as the jury might rightly consider. Assuming that they were—on what length of lease should the compensation have been assessed? If it could be said that the giving of notice by the claimants was the natural result of an injury done to them by the railway company, then the case might have been different, but I found my judgment on this, that it cannot be said that the giving of notice to put an end to the lease was the natural consequence of what the railway company had done or were about to do. Even supposing the railway company had already partially interfered with the lights, was it more than a free exercise of their will on the part of the claimants that they gave the notice to put an end to their lease? It was nothing but their own option to be exercised at their own will with or without reason, and they gave the notice in exercise of that right.

It is said that they might have got more compensation by not exercising their option, but how can that affect the question if their exercising their option was not the result of anything that the railway company did? They may have prevented themselves from claiming compensation which they would otherwise have recovered. I think it was overlooked in the Court below that the cessation of the lease was at the free will and pleasure of the lessees, and was not the legal result, because not a necessary result, of what the railway company did, and is not to be attributed to the railway company. The claimants had reduced themselves to the position of persons having a lease up to November 11, and any compensation given on the footing that they were to be treated as lessees for fourteen years must be wrong.

As to the alternative verdict, it is immaterial whether any of the heads of compensation are such as could not be sustained in law, and I give no opinion on this subject, for the Attorney-General in the Court below declined to discuss the matter at all, and agreed that if the claimants could not recover 3000*l.*, they are to recover 450*l.* I think, therefore, this appeal must be allowed, and that the judgment must stand for the smaller sum.

FRY, L.J. In this case the facts are short. A lease was granted to the claimants for seventeen years, terminable by their giving six months' notice expiring on November 11, 1886. The appellants were clothed with the power of constructing certain works, the result of which would naturally have been to obstruct the windows of the claimants' property: and I conceive that on or before May 6 those works had been commenced, but there is no evidence before us to shew that on May 6 these works had occasioned any damage or injury whatever to the respondents' property. On that day they were minded, not as they suggest in the interests of the railway company, but probably because they thought it was the reasonable and best course to take, to give notice to determine the lease, and they gave notice accordingly. On September 14 they made their claim as persons injuriously affected. The claim appears to me to be based upon an entirely erroneous view of their rights and position. It alleges that in the construction of the works by the company they had injuriously affected the lands and hereditaments specified in the schedule, to which they were entitled in the manner mentioned; and in the schedule they describe the property in question, and claim for it as owners of a fourteen years' term. Now such a claim was a misleading one; because in September they were not lessees for fourteen years, but they were only lessees for the interval of time between September 14 and November 11. But I should be sorry to decide the case upon that point of form, because it appears to me that the real position of the parties was known to them both, and was brought by them before the jury when the inquisition was held on November 8.

The first question which has been argued in this case, and which in my judgment is sufficient to determine it, is this:

1887

THE QUEEN v. POULTER.

Fry, L.J.

Could the claimants by their claim recover for prospective injury to result to their property from the future exercise of the powers of the company, or could they recover only in respect of injuries already done, although in estimating the compensation to be paid, future damage resulting from past injury might be taken into consideration? To answer that question we must have regard to the statute under which this claim is made. The two clauses upon which the claimants have relied are the 6th and 16th clauses of the Railways Clauses Consolidation Act, 1845. The first of those clauses provides for the payment to the class of claimants of "full compensation for the value of the lands taken or used." Now I pause to observe that that is land "taken or used," and not land intended to be taken or used, "and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith vested in the company." In my opinion those words relate to damage sustained at or before the date of the claim, or at the latest, the date of the inquisition, and do not relate to future injury resulting in future damage. I substitute the word "injury" for "damage," because it appears to me that the word "damage" is used in the section of the statute which I have read for "injury"; and that although future injury cannot be claimed for—for the future exercise of the powers cannot be regarded—yet nevertheless future damage resulting from a past injury would be the subject of a claim for compensation. Now Mr. Moulton has asked us to read the section as if it entitled him to claim for all damage already sustained, and hereafter to be sustained, by reason of the exercise, either in time past or in time future, of the powers of the company. It appears to me that there is no such right to compensation given by that clause. The other clause which is referred to is the 16th section of the same Act. That, after vesting certain powers in the railway company, concludes with a provision, the material portion of which is this, that in the exercise of the powers the company "shall make full satisfaction, in manner herein and in the special Act and any Act incorporated therewith provided, to all parties interested, for all damage by them sustained by reason of the exercise of the

powers." There, again, to my mind the language expresses and is intended to describe an injury already caused and resulting in damage already sustained by reason of the exercise in time past of the powers of the company. Again, Mr. Moulton asks us to read that as including all injury sustained, or to be sustained, by reason of the exercise in time past or in the time to come of the powers of the company. It appears to me, notwithstanding the very able argument which we have heard, that so to read the clauses in the Act would be to give two grounds for claiming compensation. One ground would be because you had sustained injury; the other ground would be because you feared injury. Even if in this particular case the two claims would not overlap, it appears to me that in the majority of cases they would overlap, and that if one man could maintain a claim because he was afraid of injury, and the other man could maintain a claim because he had sustained it, two men might recover for the same injury, the one looking at it as in the time to come, and the other looking at it as in the time past. It is said, however, that there are authorities which are binding upon us in favour of that construction of the sections in the Act. The two cases which have been referred to are *Caledonian Ry. Co.* v. *Lockhart* (1) and *Croft* v. *London and North Western Ry. Co.* (2) It appears to me that neither of those cases lays down anything like the proposition for which they are cited. On the contrary, they appear to me to have been cases in which, by the convention between the parties, future injury was to be ascertained. In the case of *Croft* v. *London and North Western Ry. Co.* (2), the submission to arbitration appears to me distinctly to include an agreement to compensate for injuries which might be sustained. The same I conceive was the case also in the case of *Caledonian Ry. Co.* v. *Lockhart* (1); and the question whether under the two sections to which I have referred a claim could be made for prospective injury does not appear to me to have been raised in those cases. It certainly was not decided, therefore I cannot regard them as any authority for the proposition which has been urged upon us.

Now, if it be true that the whole right of the claimants depends upon an injury having been sustained by reason of the past exercise of the powers of the company, I am to ask myself whether,

(1) 3 Macq. 808. (2) 32 L. J. (Q.B.) 113.

1887

THE QUEEN v. POULTER.

Fry, L.J.

on May 6, there is any evidence that any injury had been sustained by the claimants by reason of the exercise of the powers of the company? I am bound to answer that question in the negative. There is no evidence whatever of any such injury at all, and so there could be no evidence that the notice given on May 6 was the natural result of such injury. It is said, indeed, and I dare say said truly, that the giving of that notice was the natural result of the fear which the claimants felt of injury in the future: but, as I have already pointed out, the statute, in my judgment, gives no claim quia timet in respect of injury to be sustained in the future.

That appears to me really to determine the case, because if that is so, then it follows that the act of the respondents in giving the notice was an act not giving rise to a claim under the statute, and consequently the supposition that the respondents should be placed in the same position for any purpose as if they were owners for the term of fourteen years is erroneous.

There is, of course, a further question, as to which I do not in any way differ from the view of the Master of the Rolls, which is this, that even if, on May 6, there was some injury sustained by the claimants, there is nothing to make the giving of the notice a natural and necessary result of that injury. For these reasons it appears to me that the respondents' case fails. I think that the case was put before the jury substantially on the two alternatives. Take fourteen years, and say what the sum to be awarded to the claimants is on that hypothesis; take the claimants as having nothing but the term expiring on November 11, and say what is to be given them on that hypothesis. On this second inquiry the jury proceeded on the same principle as to the measure of damage as on the first; and inasmuch as the Attorney-General did not argue that the 450*l.* should be diminished, it appears to me that the question on what footing the compensation under the second alternative ought to be ascertained is not open to discussion in the present case.

BOWEN, L.J. I agree.

Appeal allowed.

Solicitor for claimants: *W. W. Young.*

Solicitors for company: *F. C. Mathews & Browne.*

A. M.

[IN THE COURT OF APPEAL.]

1887
Nov. 28.

MATTHEWS *v.* MUNSTER.

Counsel—Conduct of Action—Authority to compromise.

On the trial of an action for malicious prosecution the defendant's counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for 350*l.* with costs upon the understanding that all imputations against the plaintiff were withdrawn:—

Held, that this settlement was a matter which was within the apparent general authority of counsel and was binding on the defendant.

THIS was an appeal from the refusal of the Queen's Bench Division to set aside a verdict entered for the plaintiffs.

The action was for malicious prosecution, and was tried before Pollock, B. The case was part heard on Saturday afternoon and was continued on the Monday following. The defendant and his solicitor, who were on their way from Brighton, telegraphed to their counsel that they would reach London at eleven o'clock, but before they arrived at the court and during the progress of the plaintiff's case, counsel for the defendant, acting on a suggestion made by the learned judge, consented to a verdict passing for the plaintiffs for 350*l.* and costs, and agreed that all imputations should be withdrawn against the plaintiffs. The defendant applied to the Queen's Bench Division to set aside this compromise and for a new trial, and a joint affidavit of himself and his solicitor was filed. In this affidavit the defendant said: "I entirely repudiate the terms consented to in court this morning. I had given no authority nor had I ever been asked to consent to any terms of settlement," and the solicitor said "I gave no authority to consent to any terms of settlement." The managing clerk deposed that he was in court, that he had no authority to consent to any terms of settlement, and that he begged counsel to wait until the defendant and his solicitor arrived at the court.

The Court, Stephen and Wills, JJ., refused the application.

The defendant appealed.

Wilberforce, (*H. Rimington Wilson*, with him), for the defendant. A counsel retained in a cause has only authority to conduct it

1887

MATTHEWS v. MUNSTER.

and not to compromise it. There is no doubt authority against this view, but it is confirmed by the judgment of Crowder, J., in *Swinfen* v. *Swinfen* (1), and of Romilly, M.R., in *Swinfen* v. *Swinfen* (2). The authorities, *Prestwich* v. *Poley* (3), *Swinfen* v. *Lord Chelmsford* (4), and *Strauss* v. *Francis* (5), are against the defendant; but it is submitted that they ought not to be extended to such a case as the present. The first of these cases arose out of the compromise of an action by the plaintiff's attorney, and there is a distinction between that case and the present, as the client would have a right of action against the attorney in respect of his conduct which he would not have against counsel.

If there were authority as to matters in dispute in the cause there is none as to matters outside, and counsel has no right to purport to bind his client as to such a matter as withdrawing imputations, which is not connected with the action.

Kemp, Q.C., and *R. W. Harper*, for the plaintiffs, were not called on.

LORD ESHER, M.R. In this case an action was brought by the plaintiffs against the defendant for malicious prosecution, and the cause came on for trial. In the course of the case and while the defendant was not present in Court, his counsel, desirous to do what in his judgment was best for his client, submitted to a verdict for the plaintiffs for a particular amount, and that certain imputations on the plaintiff's conduct should be withdrawn, that is, he submitted to a verdict on terms. The defendant now seeks to set aside this verdict and to have a new trial on the ground that counsel in agreeing to it did that which they had no authority to do.

This state of things raises the question of the relationship between counsel and his client, which is sometimes expressed as if it were that of agent and principal. For myself I do not adopt and never have adopted that phraseology, which seems to me to be misleading. No counsel can be advocate for any person against the will of such person, and as he cannot put himself in

(1) 1 C. B. (N.S.) 364; 26 L. J. (C.P.) 97.
(2) 27 L. J. (Ch.) 35.
(3) 18 C. B. (N.S.) 806; 34 L. J. C. P. 189.
(4) 5 H. & N. 890; 29 L. J. (Ex.) 382.
(5) Law Rep. 1 Q. B. 379.

that position so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client.

I apprehend that it is not contended that this power cannot be controlled by the Court. It is clear that it can be, for the power is exercised in matters which are before the Court, and carried on under its supervision. If, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the Court has authority to overrule the action of the advocate.

I have said that the relation of an advocate to his client can be put an end to at any moment, but that the withdrawing of the authority must be made known to the other side, and this shews that the client cannot give directions to his counsel to limit his authority over the conduct of the cause and oblige him to carry them out, all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so.

Now let me consider what authority there is on this point. In *Swinfen* v. *Lord Chelmsford* (1), Pollock, C.B., in delivering the judgment of the Court said (2), "We are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it—such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and

(1) 5 H. & N. 890; 29 L. J. (Ex.) 382. (2) At p. 922.

1887

MATTHEWS v. MUNSTER.

Lord Esher, M.R.

the management and conduct of the trial—we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it." The instances that are given shew that one of the things that counsel may do, so long as the request of the client to him to act as advocate is in force, is to assent to a verdict for a particular amount and upon certain conditions and terms; and the consent of the advocate to a verdict against his client and the withdrawing of imputations is a matter within the expression "conduct of the cause and all that is incidental to it." If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed. This case is a still stronger one, for the client was not present, and it is not pretended that he ever withdrew his authority to counsel, but he now comes forward and asks that because he does not like what has been done it should be set aside as between himself and his opponent. This the Court will not do, and this appeal must be dismissed.

BOWEN, L.J. This was an action for malicious prosecution brought by a gentleman and his wife against the defendant. It came on for trial in the ordinary course, counsel were instructed, and the first day of the trial passed. The case was called on on the second day, and the defendant, instead of coming into court where he might have exercised his influence on the course the case might take, was absent. During his absence he left his counsel with complete command and with authority to do whatever he thought best. Counsel agreed to a verdict for the plaintiffs, which the Court below refused to set aside.

It seems to me that within certain limits the retainer shews that counsel has authority to bind his client. What those limits are seems to me to be laid down by Pollock, C.B., in the passage that has been read. Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party. It has been frequently discussed, as far back as the time of Best, C.J., if not further, whether counsel can be called the

agent of his client, but on this it is sufficient to say that even if he is called an agent he is not one in the ordinary sense, but has a particular authority, the origin of the limit of which it is not necessary to examine. What is to be done if the client is in Court? Is it the duty of counsel to consult him? I should say—yes, with regard to important matters in which the client has an interest. It does not follow that counsel will submit to carry out the view of the client if it appears that it would be injurious to the client's interest. He has the alternative of returning his brief. I should be sorry to say that counsel ought not to consult his client on such a matter as a compromise of the action, but that is a point we have not got to consider, for in the present case the client was not present and cannot complain if his counsel, who was in command and had authority to do the best for his client, compromised the suit within the reasonable limits of his authority to compromise. In this particular case it was clear what was done was within the reasonable scope of the advocate's authority within the rule laid down by Pollock, C.B.

FRY, L.J. Prior to the compromise in this case counsel had received no instructions as to a compromise. In the compromise itself there was nothing collateral to the action, nothing unjust, and there was no mistake of fact on the part of counsel. In the absence of all these matters it was plainly the duty of counsel to do that which he considered best for his client. I think it would be disastrous—I do not say in the interest of the bar but—in the interest of litigants if we had to decide otherwise, for such a result would often necessitate the refusal, because the client happened to be absent, of an offer of compromise highly advantageous to him.

Appeal dismissed.

Solicitors for plaintiffs: *Morris & Richards.*
Solicitor for defendants: *W. Brewer.*

A. M.

1887
Dec. 10.

IN RE VANDERHAEGE. EX PARTE IZARD.

Bankruptcy—Practice—Security for Costs—Proof by Creditor resident Abroad —Bankruptcy Rules, 1883, *rr.* 131, 148.

The Court has no jurisdiction to order a creditor resident abroad, who is appealing from the rejection of his proof by the trustee, to give security for the costs of such appeal.

APPLICATION by the trustee that a creditor appealing against the rejection of a proof should give security for costs.

Madame de Vines, a French lady, resident in Paris, tendered a proof against the bankrupt's estate for 12,000*l.*, which the trustee rejected. Madame de Vines appealed.

F. C. Willis, for the trustee. The appeal is a matter which will involve considerable expense, and the case is one in which security ought to be given.

H. Reed, for the creditor. There is nothing in the Bankruptcy Act or the Rules that give the Court jurisdiction to make such an order as this. Rule 131 deals only with appeals to the High Court, and r. 148 applies only to the case of a petitioning creditor resident abroad. This is not in fact an appeal to the High Court; and a trustee cannot oblige a foreign creditor to give security for costs simply by rejecting his proof.

F. C. Willis, in reply. It may be admitted that there is no special enactment in the Bankruptcy Act or Rules on this point, but the practice under the Judicature Acts is applicable, and it is within the general jurisdiction of this Court, as a branch of the High Court, to order security for costs to be given by a creditor resident out of the jurisdiction whenever it thinks it just and reasonable.

CAVE, J. This application must be refused. The counsel for the trustee was unable to produce any enactment or authority that security for costs can be ordered in such a case as this. The Rules which have been referred to indicate the cases in which such security can be required, and that raises the primâ facie inference that it cannot be enforced in cases which are not mentioned in

the Rules. I think it would be oppressive to require a creditor resident abroad, who is prosecuting his claim to prove against a bankrupt's estate here in due course, to give security for costs of an appeal against the rejection of his proof by the trustee. If such a course were adopted, the trustee would be tempted to reject a proof without investigation in order that he might get security for the cost of investigating it before the Court.

Solicitors: *F. A. Foster & Co.; Goldberg & Langdon.*

H. L. F.

KAYE *v.* SUTHERLAND.

Nov. 29.

Practice—Writ—Service out of Jurisdiction—Contract affecting Land, what is—Landlord and Tenant—Compensation for Tenant-right—Custom of the Country—Order XI., *r.* 1 (*b*) (*e*)

In an action by the outgoing tenant of a farm in Yorkshire to recover from his landlord, who was ordinarily resident in Scotland, compensation for tenant-right according to the custom of the country:—

Held, that a "contract, obligation, or liability affecting land" was sought to be enforced in the action, and therefore that the Court had power, under Order XI., r. 1 (b), to allow service of the writ of summons out of the jurisdiction.

Agnew v. *Usher* (14 Q. B. D. 78) distinguished.

MOTION by way of appeal from an order, made by Charles, J., on an ex parte application at chambers, giving leave to the plaintiff to serve a writ of summons out of the jurisdiction.

The writ in the action was indorsed with a claim "for tenant-right and tenant's compensation in respect of a farm situate at Northowram, near Halifax, in the county of York, and for breach of an agreement to pay tenant-right and tenant's compensation."

The plaintiff became tenant to the defendant of the farm in question in 1873, and the tenant-right and compensation were claimed, as appeared from an affidavit made by the plaintiff, under the custom of the country, upon the expiration of the tenancy on May 1, 1886.

The defendant's affidavit stated that his ordinary place of residence and domicil were in Scotland, and that he had no place of residence whatever within the jurisdiction.

1887

KAYE v. SUTHERLAND.

R. O. B. Lane, for the defendant. This is not a contract affecting land within Order XI., r. 1, by which "service out of the jurisdiction of a writ of summons may be allowed whenever—(b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action." The obligation to pay for tenant-right is a mere personal obligation binding on the landlord, but it is not an obligation which affects the land. *Agnew* v. *Usher* (1) is in point. Applying to this case the test applied by Lord Coleridge, C.J., there is nothing in the contract which affects the "property, or possession, or status" of land. *Agnew* v. *Usher* (1) was taken to the Court of Appeal, but the decision there was upon a collateral point, the Court observing that it was unnecessary to decide this question.

J. L. Walton, for the plaintiff. Where the action is founded upon the liability to pay for tenant-right according to the custom of the country in a part of England, it is obviously more reasonable, as a matter of general convenience, that the plaintiff should be allowed to sue within the jurisdiction, instead of being driven to sue in Scotland. *Agnew* v. *Usher* (1) is distinguishable. The decision turned upon the right of the plaintiff to sue the assignee of the lease for rent. In the case of rent the lessee, or his assignee, may be liable upon the covenant to pay rent without being in possession. The contract in the present case is founded upon the custom of the country, which casts upon the landlord, as an incident of his ownership of the land, the obligation to pay for tenant-right. The liability attaches to the land, and does not arise out of the contract of the parties: *Mansel* v. *Norton*. (2) In *Jones* v. *Robin* (3), Parke, B. (at p. 635), says, "A custom is the lex loci, an ancient local law in some known district, as a hamlet, town, or manor: Co. Litt. 110 b; and does not arise from the grant, act, or agreement of the party." It is submitted that the obligation here, being founded upon the custom, does affect land, and is therefore within clause (b).

R. O. B. Lane, in reply. The decision of the question in

(1) 14 Q. B. D. 78. (2) 22 Ch. D. 769.
(3) 10 Q. B. 620.

dispute between the plaintiff and defendant would not bind the land, except between the same parties in respect of the same tenancy. The custom of the country is a term implied in all contracts made with respect to land to which the custom applies, unless expressly excluded by the parties. It differs, therefore, from a custom with respect to rights of common (which was the custom in *Jones* v. *Robin* (1)), or the custom of gavelkind or borough English, which do not depend on contract but attach to the land itself. *Mansel* v. *Norton* (2) does not apply, the only question in that case being whether the liability to pay the outgoing tenant fell upon the tenant for life or upon certain trustees of a long term of years.

STEPHEN, J. This is a case of some difficulty and importance. I accede to what was said in argument, that there would be hardship and inconvenience to the plaintiff if he were compelled to sue in Scotland for the breach of a contract, made in Yorkshire, to pay compensation for tenant-right according to the custom of the country in the part of Yorkshire in which his farm was situated. The hardship and inconvenience would be just the same if the position were reversed, and the plaintiff brought his action within the jurisdiction for breach of a similar contract made with respect to the tenancy of land in Scotland. The question of law we have to decide is whether or not this case falls within Order XI., r. 1 (b). It clearly falls within the terms of the first part of clause (e), but as the defendant ordinarily resides in Scotland, the exception at the end of clause (e) applies to preclude service out of the jurisdiction being allowed under that clause. Rule 1 has received an interpretation in *Agnew* v. *Usher* (3), in which case the Court held that an action to recover rent due on a lease of land in England was not within clause (b). Is this case covered by that decision? I agree with Lord Coleridge, C.J., that the same contract might be within clause (b) and also within clause (e). He said also that he did not intend to give an exhaustive account of all possible proceedings "affecting land" which would probably be within clause (b).

(1) 10 Q. B. 620. (2) 22 Ch. D. 769.
(3) 14 Q. B. D. 78.

1887

KAYE v. SUTHERLAND.

Stephen, J.

It was enough for the Court to say that the action in that case (which was an action to obtain payment of rent from the assignees of the lease) was not an action to enforce any "contract, obligation, or liability affecting land." Lord Coleridge stated that, as a general rule, "actions of ejectment and of the like kind, when the land of which the property, or possession, or status is disputed is English land, should be brought in England." I do not feel myself bound to apply the decision in *Agnew* v. *Usher* (1) to the present case. The words to be construed are "affecting land." I am of opinion that this is an action to enforce a contract, obligation, or liability affecting land within the meaning of clause (b). It is a contract which affects land in this sense: It is alleged by the plaintiff that the land was let under a contract made subject to the custom of the country in respect of paying compensation for tenant-right; and that custom applies to all contracts made within the district which it covers, unless expressly excluded by the parties. The contract is therefore made upon terms affecting a certain definite portion of land in the neighbourhood of the plaintiff's farm. I quite agree that the custom of the country is not so strong a case of affecting land as the custom of gavelkind, or borough English, or the like. This contract appears to me to hold a middle position between contracts made subject to such customs as gavelkind or borough English on the one hand, and contracts to pay rent on the other. The land is affected in the sense that it is held subject to the custom, which forms part of the contract under which land is usually taken in that part of the country. I observe that Lord Coleridge in *Agnew* v. *Usher* (1) is guided by his view of the general convenience of the interpretation he was giving to rule 1, and there can be no question that the general convenience is in favour of the course the plaintiff desires to take here. Mathew, J., agreed with him, and A. L. Smith, J., though he differed slightly as to the meaning of clause (b), said nothing inconsistent with the view of the rest of the Court. I am of opinion that we have power, under Order XI., r. 1 (b), to allow service out of the jurisdiction.

(1) 14 Q. B. D. 78.

1887

KAYE v. SUTHERLAND.

CHARLES, J. I am of the same opinion. The claim in the action is based upon the custom of the country with respect to tenant-right. Is the action an action to enforce a contract, obligation, or liability affecting land within the jurisdiction? I think it is. I think it is an action to enforce all three of the things described in clause (b): there is a contract between, and an obligation and a liability imposed upon, the owner and occupier respectively, by virtue of the local law, which introduces into the contract an additional term, though perhaps it would be more correct to say, having regard to the dictum of Parke, B., in *Jones* v. *Robin* (1), that the parties contract with reference to the custom. I am of opinion that such a custom does affect the land which is subject to it. In *Agnew* v. *Usher* (2) the action was brought to recover from the assignees of a lease rent due under the lease. The defendants asserted that the assignment was to secure a debt, but that they never accepted the assignment, nor entered into possession of the land. I think that Lord Coleridge's judgment says no more than that the action was brought for money due, and should be brought as a personal action in the forum of the defendant. It is true that A. L. Smith, J., says that in his view the words "sought to be enforced in the action" seem to mean "specifically performed," but I think that the decision of the Court only came to this, that an action against the assignee of a lease for rent due was not within clause (b) of rule 1. I agree that this case is distinguishable for the reasons given by my brother Stephen, and those I have stated. With great respect for the opinion of A. L. Smith, J., I should hesitate to narrow the operation of clause (b) by holding that it only applied where specific performance of some contract or obligation was sought.

Motion dismissed.

Solicitors for plaintiff: *Elliott & Ash, for Robinson & Robinson, Keighley.*

Solicitors for defendant: *Emmet, Son, & Stubbs.*

(1) 10 Q. B. at p. 635. (2) 14 Q. B. D. 78.

W. A.

1887
Dec. 9.

ROBEY & CO. *v.* THE SNAEFELL MINING COMPANY, LIMITED.

Practice—Writ—Service out of Jurisdiction—Work done in Isle of Man—Place of Payment—Order XI., *r.* 1 (*e*).

In an application for service out of the jurisdiction it appeared that the action was brought by the plaintiffs, engine makers in England, for the price of machinery erected by them in the Isle of Man for the defendants, a company carrying on business in the island.

There was no agreement as to the place of payment:—

Held, that it must be taken to be part of the contract that the plaintiffs should receive payment in England, that the action was therefore founded on a breach within the jurisdiction, according to Order XI., r. 1 (*e*), and that service out of the jurisdiction might be allowed.

MOTION by way of appeal from an order by Charles, J., in chambers, giving leave to the plaintiffs to issue and serve a writ out of the jurisdiction.

It appeared that the plaintiffs, engineers in business at Lincoln, received from the defendants, a company which was registered and had its office in the Isle of Man, an order, by letter, for a boiler and machinery to be delivered at the company's mine in the island, and set up and put into work to the complete satisfaction of the directors and any qualified engineer they might appoint, for 585*l*.

The plaintiffs accepted and executed the order. The defendants had not paid the price, and the action was brought to recover it.

Odgers, for the defendants. First, the learned judge had no power to make the order. By Order XI., r. 1, service out of the jurisdiction may be allowed whenever "(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

Delivery of the goods and payment under this contract are concurrent acts to be done in the Isle of Man. Therefore the contract was not one "which ought to be performed within the jurisdiction," nor is the alleged breach within the jurisdiction.

The rule that a debtor must seek his creditor only applies if he is within the realm of England: "For if he be out of the realm of England he is not bound to seek him, or to go out of the realm to him:" Co. Lit. sect. 340, p. 210 b; Sheppard's Touchstone, cap. 6, p. 136.

Secondly, assuming that the Court has power to allow service out of the jurisdiction, the power should not be exercised in the present case. All the defendants' witnesses are in the Isle of Man and the plaintiffs' witnesses must go there to examine the machinery at work.

Duke, for the plaintiffs. First, the contract was made in Lincoln, and the performance of it by the defendants ought to be there. They would in the usual course of business send cash or a cheque to Lincoln. The Isle of Man is not excepted, as Scotland and Ireland are, from Order XI., r. 1 (*e*). In *Hassall* v. *Lawrence* (1), lately decided in this Division, an order obtained by a plaintiff in England to serve a defendant in Australia with a writ in an action for goods sent to the colony was upheld.

Secondly, the balance of convenience is in favour of the plaintiffs. They and their workmen who made the machinery and their legal advisers are in Lincoln, and ought not to be put to the cost and inconvenience of going to the Isle of Man.

Odgers, in reply. The decision in *Hassall* v. *Lawrence* (1) turned on the particular facts of the case. It will be at least as inconvenient for the defendants as for the plaintiffs to cross the sea.

Cur. adv. vult.

1887. Dec. 9. The judgment of the Court (Stephen and Charles, JJ.) was delivered by

STEPHEN, J. The first question is whether the Court has jurisdiction to grant leave to serve the writ in the Isle of Man; that depends on the mode in which the contract was to be executed. The plaintiffs were to deliver the machinery in the Isle of Man, and the defendants were to pay for it upon delivery, and upon the receipt of a certificate from their engineer that the machine was in good working order. There was no definite agreement as

(1) Times Rep. Nov. 2, 1887, p. 23.

1887

ROBEY v. SNAEFELL MINING COMPANY.

Stephen, J.

to where the money was to be paid. We think that so far as regards the question of jurisdiction the contract was to be executed within the jurisdiction, and that the debtors having to pay for the goods it was their duty to send or bring the money to the creditors. Some authority for that is to be found in Coke upon Littleton to the effect that the obligor of a bond must go to the obligee in order to pay it. This in practice would impose little inconvenience on the defendant, and therefore there is not likely to be much authority on the subject at the present day. The question can only become material in some such case as this. The ordinary course of business would be for the defendants to send a cheque to the plaintiffs at Lincoln, and payment would no doubt take place there when the cheque was received at Lincoln, or was cashed, or at any rate accepted in payment. Suppose that, according to a primitive mode of dealing the defendants had to pay in coin, they would have to carry it to Lincoln, and the plaintiffs would not be under the necessity of going over to the Isle of Man to get it. Light is thrown on Order XI., r. 1 (*e*), enabling the Court to allow service of a writ out of the jurisdiction when the action is founded on a breach within the jurisdiction of a contract "which ought to be performed within the jurisdiction"—by the exception, "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." But there is no such exception as to defendants in the Isle of Man. The Scotch and Irish having their own Courts secured practically the privilege of being sued in Scotland or Ireland respectively, the Manxmen did not. We think therefore there is jurisdiction to allow service of the writ. The second question is whether in the exercise of our discretion we should allow it to be served in the Isle of Man. The plaintiff must of course go to a Court with jurisdiction over his case, but subject to that he may choose his forum. He has chosen to sue in the High Court. It is said that there is a cheaper Court in the Isle of Man. There may be, and I have no reason to doubt that the Courts there are perfectly competent, but the plaintiff may choose, and he prefers the English Court. As to the balance of convenience, one or other of the parties with the respective witnesses must cross the sea, and I do not think it unreasonable to say that the party who chooses the Court should, if he likes,

spare himself, his witnesses and advocates, the possibility of a disagreeable voyage.

1887

ROBEY v. SNAEFELL MINING COMPANY.

Motion dismissed.

Solicitors for plaintiffs: *Page & Scorer.*

Solicitors for defendants: *Crowdy, Son & Tarry.*

J. R.

PILLEY *v.* ROBINSON.

Dec. 6.

Practice—Adding Parties—Non-joinder of Defendant—Joint Contract—Rules of Supreme Court, 1883, *Order* XXI., *r.* 20; *Order* XVI., *r.* 11.

Where an action is brought against one only of several joint contractors the defendant is entitled as of right, under Order XVI., r. 11, to have his co-contractors joined as defendants:—

So *held* by Stephen and Charles, JJ., on the authority of *Kendall* v. *Hamilton* (4 App. Cas. 504).

APPEAL against a decision of Pollock, B., at chambers, refusing the defendant's application to join Mr. W. H. Robinson and Mr. Edmonds as co-defendants.

The action was for 9440*l.* 12*s.* 8*d.*, moneys alleged to have been had and received by the defendant to the plaintiff's use between 1876 and 1886. The defendant was a solicitor, and stated in an affidavit that the claims arose out of the retainer of firms in which he was or had been a partner, viz., from 1876 to 1883, Robinson, Son & Edmonds, consisting of himself, Edmonds, and W. H. Robinson, from 1883 to 1886, W. Robinson & Son, consisting of himself and W. H. Robinson. It appeared that the new firm had not taken over the liabilities of the old firm on its dissolution in 1883. Edmonds opposed the application, and deposed that while a partner in Robinson, Son & Edmonds, he had never had any personal relations with the plaintiff. The plaintiff also opposed the application.

Herbert Reed, for the defendant. Under Order XVI., r. 11 (1), the order applied for should have been made as of course. The sums

(1) By Rules of Supreme Court, Order XXI., r. 20: "No plea or defence shall be pleaded in abatement." By Order XVI., r. 11, "The Court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court

1887

PILLEY v. ROBINSON.

claimed if due at all, are only due as joint debts by firms. Persons jointly liable to pay a debt can insist on being sued together. This legal right was formerly enforced by a plea in abatement. Now Order XVI., r. 11, empowers the Court or a judge at any stage of the proceedings to order any persons whose presence as such is necessary to be made defendants. *Kendall* v. *Hamilton* (1), is an express authority. There the House of Lords discussed the effect of the abolition of pleas in abatement and the new powers as to joinder, with the result that it was held by six of the Lords against a single dissentient, Lord Penzance, that a defendant in an action on a contract has still, as before the Judicature Acts, a right to have his co-contractors brought in as defendants.

A. Walker, for the plaintiff. The defendant is not entitled to the order applied for. The plaintiff ought not to be forced to include in the action persons against whom he does not wish to proceed, and persons ought not to be made defendants at the instance and for the convenience of the defendant alone.

Douglas Walker, for Edwards. The right of joinder contended for does not exist under the new rules of procedure. These rules abolish pleas in abatement, and the result is that a defendant has no longer a right to force another defendant on the plaintiff. The statutes which regulated the old procedure, first, 3 & 4 Wm. 4, c. 42, ss. 9, 10, 11; and secondly, the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) ss. 34, 39, contained provisions for the payment over by the plaintiff to the defendant of the costs occasioned by the joinder of a defendant who proved not to be liable. The rules under the Judicature Acts contain no such provision. Order XVI., r. 11, alone applies, and the generality of its terms shews that the real abolition of pleas in abatement is intended. A discretion survives to the Court, but it cannot have been intended that this discretion should be exercised in aid of

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or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

(1) 4 App. Cas. 504.

the defendant alone. *Kendall* v. *Hamilton* (1) merely shews that the plaintiff, if successful in the action, cannot afterwards proceed against the other members of the firm. The plaintiff does not desire to preserve this remedy. The question is one of procedure, and the defendant's proper course is to apply for leave to issue third party notices to his former partners under Order XVI., rr. 48–55." Should leave be granted, the plaintiff will not be interfered with in the exercise of his rights, and the defendant will be in the same position as to enforcing contribution by his partners as if he could still plead in abatement.

Herbert Reed, in reply, cited the judgment of Jessel, M.R., in *Werderman* v. *Société Générale d'Electricité*. (2)

STEPHEN, J. It has been ably argued that in this case the proper course would be to employ the third party procedure. The contention was very clearly put before us, and my learned Brother and myself were inclined to agree with the argument. But the weight of authority in *Kendall* v. *Hamilton* (1), which is a decision of the House of Lords, is such that I do not feel at liberty to make such an order. It is true that *Kendall* v. *Hamilton* (1) does not decide the precise point which is raised here. But in the judgments the precise point is dealt with in very plain language. Lord Cairns says (3): "Although the form of objecting, by means of a plea in abatement, to the non-joinder of a defendant who ought to have been included in the action, is abolished" (by the Judicature Acts), "yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed." It is not denied that these persons are co-contractors with the defendants; therefore their non-joinder could have been made the subject of a plea in abatement under the old practice. Lord Blackburn examines with characteristic fullness the whole history of the plea, and decides that (4) "the Judicature Acts have not taken away the right of the joint contractor to have the other joint contractors joined as defendants, or made it a mere matter of discretion in

(1) 4 App. Cas. 504.
(2) 19 Ch. D. 246.
(3) 4 App. Cas. at p. 516.
(4) At p. 544.

1887

PILLEY v. ROBINSON.

Stephen, J.

the Court to permit it." The weight of these expressions of opinion is added to by the fact that Lord Penzance took the opposite view of the effect of the Judicature Acts, a view which would justify me in holding, as I should myself be inclined to hold, that the only right of the defendant was to serve third party notices on these persons. This is the effect, as it appears to me, of *Kendall* v. *Hamilton* (1), and the argument addressed to us has not explained away the decision. The appeal must therefore be allowed.

CHARLES, J. I am of the same opinion. The application is made under Order XVI., r. 11, which empowers the Court to order "that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, be added." Having regard to the machinery of third party procedure I at first thought that we ought not to act under this rule. But the House of Lords in *Kendall* v. *Hamilton* (1) appears to have decided the contrary. In that case an attempt was made to sue a defendant who might have been joined in a previous action by the same plaintiff or the same contract against the defendant's two co-contractors. The House of Lords decided that the action was not maintainable. They adopted the rule laid down in *King* v. *Hoare* (2), that judgment recovered against one of two co-contractors is a bar to an action against the other. Now in *King* v. *Hoare* (2) the ground of the decision was that the joint contractor who was not sued in the former action could have been then brought in as a defendant as of legal right by the joint contractor who was sued, under a plea in abatement, and that for this reason another action could not be maintained on the same contract. Pleas in abatement are abolished under the Judicature Acts, and it was contended in *Kendall* v. *Hamilton* (1) that because of the abolition of pleas in abatement the judgment already recovered against two of the co-contractors was no longer a bar to an action against the third co-contractor, and, therefore, that, notwithstanding the rule in *King* v. *Hoare* (2), the plaintiff could still sue the defendant. The House of Lords, however, held that the rule in *King* v. *Hoare* (2) still applied under the Judicature Acts, and that the

(1) 4 App. Cas. 504. (2) 13 M. & W. 494.

1887

PILLEY v. ROBINSON.

Charles, J.

judgment which had been recovered against the defendant's co-contractors was therefore a bar to the action against the defendant. That the expressions cited by my learned brother are not obiter dicta, is shewn by the judgment of the one dissentient, Lord Penzance. Lord Penzance held that the plaintiff was entitled to sue the defendant notwithstanding the prior action on the same contract, on the ground that the rule in *King* v. *Hoare* (1) had since the Judicature Acts no application, and that the old right of the co-contractor to insist on having his co-contractors joined as defendant, had, since the abolition of pleas in abatement, ceased to exist. His judgment shews that he considered a decision of the latter question, the effect of the Judicature Acts as regards the right to add parties, an essential element in the case before the House of Lords. The effect of *Kendall* v. *Hamilton* (2) in the House of Lords is therefore to entitle the defendant to an order for the joinder of the persons whom he seeks to join, his co-contractors, as defendants in this action. The part of the judgment of Jessel, M.R., in *Werderman* v. *Société Générale d'Electricité* (3), which relates to demurrer for want of parties, seems to point to the same conclusion. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendant: *W. Robinson & Sons.*
Solicitors for Edmonds: *Cayley & Edmonds.*

(1) 13 M. & W. 494. (2) 4 App. Cas. 504.
(3) 19 Ch. D. 246, at pp. 250, 251.

H. D. W.

1887
Dec. 8.

IN RE POLLARD.

Solicitor—Bill of Costs—Order for Delivery—Business not transacted in Court—Jurisdiction—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

The power to order delivery of a solicitor's bill of costs, where no part of the business contained in such bill has been transacted in any court, which was conferred on the Lord Chancellor and the Master of the Rolls by s. 37 of the Solicitors Act, 1843, has not been transferred by any subsequent legislation, and a judge of the Queen's Bench Division has no jurisdiction to order delivery of a bill of costs in such a case.

APPEAL by Messrs. Stevens, Bawtree & Stevens, solicitors, from the decision of Field, J., refusing to order delivery by Mr. S. R. Pollard, solicitor, of a bill of costs. No part of the business in respect of which delivery of the bill of costs was sought had been transacted in any court of law or equity.

On the matter coming before Field, J., at chambers, he was of opinion that, as power to order delivery of a bill of costs in such a case is conferred on the Lord Chancellor and the Master of the Rolls by the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37, a judge of the Queen's Bench Division had no power to make an order, and therefore, without considering the question on the merits, he refused the application on the ground of want of jurisdiction.

J. E. Bankes, for the appellants. A judge of the Queen's Bench Division has jurisdiction to make the order which is asked for, and Field, J., ought therefore to have entertained the application.

In the first place there is a statutory jurisdiction. By the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37, the power to order delivery of a bill of costs for taxation, where no part of the business was transacted in any court, was vested in the Lord Chancellor and the Master of the Rolls. By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16, their jurisdiction was transferred to the High Court of Justice, and can therefore now be exercised by any judge of the High Court, under s. 39 of the same Act. The Lord Chancellor and the Master of the Rolls had jurisdiction as judges of the Court of

Chancery, and this jurisdiction is transferred to the High Court by s. 16. Moreover, the jurisdiction of the Master of the Rolls is taken away by 44 & 45 Vict. c. 68, s. 2, which makes him a judge of the Court of Appeal only, and under s. 7 of the same Act his chambers are transferred to another judge, but by the Rules of the Supreme Court, 1883, Order LV., rule 2 (15), applications under the Solicitors Act, 1843, for taxation and delivery of bills of costs are to be made at chambers.

Secondly, apart from the Solicitors Act, all judges of the High Court have a common law jurisdiction over solicitors as officers of the Court. In 1 Archbold's Practice, 136 (14th edition), after a reference to the powers of the Courts and judges under the Solicitors Act, the law is thus stated: "Independently of this enactment they have, it seems, a common law jurisdiction to compel a solicitor, as an officer of the Court, to deliver a signed bill to his client, or his personal representative, or trustee in the event of bankruptcy, and this whether the business was in an action or not." For this proposition *Clarkson* v. *Parker* (1) is cited.

[POLLOCK, B. The order there was to deliver the bill of costs in certain actions; the decision, therefore, does not bear out the statement for which it is quoted as an authority.]

The case, however, is a distinct authority in favour of the existence of the common law jurisdiction.

He also referred to *Smith* v. *Dimes.* (2)

Murphy, Q.C., (Sidney Woolf, with him), for the respondent. It is clear from the case of *In re Chaffers* (3) that the jurisdiction of the Master of the Rolls over solicitors is not taken away.

[He was stopped by the Court.]

POLLOCK, B. The business in respect of which this application is made was not transacted in any court, and the question is whether Field, J., had jurisdiction to make an order for the delivery of a bill of costs. I am of opinion that he had not. The facts were not gone into before the learned judge or before us, and therefore no decision has been arrived at on the merits, but I am of opinion that the application fails, for the following

(1) 7 Dowl. 87. (2) 4 Ex. 32.

(3) 15 Q. B. D. 467.

1887

IN RE POLLARD.

Pollock, B.

reasons. There was an old distinction between solicitors and attorneys. Practitioners were admitted as solicitors in equity and as attorneys at common law. They were officers of the courts in which they practised, and could only act in the courts in which they had been admitted, and only the judges of those Courts had jurisdiction over them. That rule was impinged upon by legislation, first by the old Act 2 Geo. 2, c. 23 (1), and afterwards by the Act now in force. In Lush's Practice, vol. i., p. 298, 3rd ed., the law is thus stated: "The superior Courts of Common Law have jurisdiction to order taxation under the statute only in cases where some part of the business has been transacted in some court not being the High Court of Chancery, nor a Court of Equity, Bankruptcy, or Lunacy; where no part of it has been transacted in any Court of Law or Equity, the application for taxation must be made to the Court of Chancery." After discussing the cases under the old Act, the learned author continues (at p. 299): "But however this may be, it is clear that in order to give these Courts jurisdiction some of the business must have been done in court, and therefore the cases decided on the former statute as to what is such business apply." Therefore up to the date of the Act now in force there was no power in the Courts of Common Law to deal with the delivery of a bill of costs to a client where the business had not been done in a court which had a taxing officer. This is clearly shewn by the decision in *Becke* v. *Wells*. (2) The present case, however, turns on 6 & 7 Vict. c. 73, s. 37, and the question is as to the true construction of that enactment. The appellants apply for an order for delivery of a bill of costs in respect of business no part of which was transacted in any Court of Equity or Common Law. The case, therefore, comes within the words in the section, "in case no part of such business shall have been transacted in any Court of Law or Equity," and in such case the power to refer the bill for taxation is given to "the Lord High Chancellor or the Master of the Rolls;" and the latter part of the section provides "that it shall be lawful for the said respective Courts and judges, in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to

(1) Repealed by 6 & 7 Vict. c. 73, s. 1.

(2) 1 C. & M. 75.

make such order for the delivery by any attorney or solicitor . . . . of such bill as aforesaid . . . . in the same manner as has heretofore been done, as regards such attorney or solicitor, by such Courts or judges respectively, where any such business had been transacted in the court in which such order was made." It is stated in Lush's Practice, vol. i., p. 298, note (*q*), that "the Lord High Chancellor or the Master of the Rolls" included the Vice-Chancellors, and I think that is correct, because the Vice-Chancellors could exercise jurisdiction which was given to the Lord Chancellor or the Master of the Rolls. A good reason for assigning the control over taxation of the costs of business not transacted in any court to the Lord Chancellor and the Master of the Rolls is to be found in the fact that a great portion of such business is what is known as "family business," with which the judges of the Courts of Common Law were naturally much less familiar than the Chancery judges. But Mr. Bankes argued that by s. 16 of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), the jurisdiction now in question was transferred to the High Court of Justice. The words in the Act of 1873 which are relied on in support of this contention are: "There shall be transferred to and vested in the said High Court of Justice the jurisdiction . . . . vested in or capable of being exercised by . . . . the High Court of Chancery, ... including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery." But the words in s. 37 of the Solicitors Act, 1843, are "the Lord High Chancellor or the Master of the Rolls," and the words "as a judge or master of the High Court of Chancery" are not found in that clause, nor is there any similar expression. It seems to me, therefore, that it is impossible to say that the effect of the Act of 1873 is to take away the jurisdiction which was given to the Master of the Rolls by the Act of 1843. Then it is said that the Lord Chancellor and the Master of the Rolls have no chambers, and that there is therefore a practical difficulty in the way of making an application to either of them; but the difficulty would be no greater than in the case of any other judge who did not happen at the particular time to be sitting at chambers.

For these reasons I am of opinion that the order was rightly

1887

IN RE POLLARD.

refused on the ground that a judge of the Queen's Bench Division has no jurisdiction to make such an order, and therefore an appeal from such refusal cannot succeed.

HAWKINS, J., concurred.

Appeal dismissed.

Solicitors: *Stevens, Bawtree, & Stevens; S. R. Pollard.*

P. B. H.

Dec. 14.

JAMES *v.* RICKNELL.

Solicitor—Authority—Employment to collect a Debt—Proceedings in Interpleader.

A solicitor who has recovered judgment for a client under an ordinary retainer, has no authority, without special instructions, to engage in proceedings in interpleader.

APPEAL from the Lord Mayor's Court.

The action was in respect of a solicitor's bill for 37*l.* 6*s.* 8*d.*, the principal item being a sum of 22*l.* 13*s.* 6*d.* for disbursements in an action of *Ricknell* v. *Coleman* in the Queen's Bench Division. In this action judgment having been recovered for the plaintiff, execution was levied, and certain household furniture, which had been seized by the sheriff, was claimed under a bill of sale. An interpleader issue was directed, and a master at chambers decided in favour of the claimant, and made an order that the sheriff should withdraw, and that the execution creditor should pay the costs of the claimant and the sheriff's costs and possession money. These amounted to 22*l.* 13*s.* 6*d.*, and the plaintiff, as solicitor to the execution creditor, the present defendant, paid the sum to the claimant and the sheriff. The jury, in answer to a question put to them by the assistant judge, found that the plaintiff received no special retainer or instructions from the defendant to engage in the interpleader proceedings.

The assistant judge directed judgment for the plaintiff for the amount of his account less 22*l.* 13*s.* 6*d.*, and his costs in respect of the interpleader proceedings.

The plaintiff appealed.

1887

JAMES v. RICKNELL.

W. E. Hume Williams, (*L. Pearson*, with him), for the plaintiff. The plaintiff as a solicitor is entitled to recover the amount of his costs and disbursements in interpleader without proof of any special retainer or instructions. He was retained by the defendant to take all reasonable steps for the recovery of the sum due from the execution debtor. It was reasonable to resist the claim which led to the interpleader issue. It is laid down in the early case of *Lawrence* v. *Harrison* (1) that the retainer of a solicitor is not exhausted upon the recovery of judgment, and extends to execution. Rolle, C.J., said: "The only question is whether the warrant of attorney be determined by the judgment given in the suit wherein he was retained; and I conceive it is not: the suit is not determined, for the attorney after the judgment is to be called to say, why there should not be execution made out against his client, and he is trusted to defend his client so far as he can from the execution." It follows that, if his client succeeds, it is equally the solicitor's duty to enforce execution against the other party. In *Jarmain* v. *Hooper and Heenan* (2), in the Court of Common Pleas, the goods of the plaintiff Jarmain were taken by mistake in execution, and the plaintiff in consequence brought an action for trespass against the sheriff and the execution creditor. The mistake was made by the sheriff in consequence of directions received from the attorney of the execution creditor, and the question, as regards the execution creditor, was, whether or not he was bound by the act of his attorney. Tindal, C.J. (3) held that the direction given by the attorney was a direction given by an agent within the scope of his authority, and bound the principal. In *Bevins* v. *Hulme* (4), Parke, B., in delivering the judgment of the Court of Exchequer, treated the retainer of the solicitor in an action as not determined by the mere recovery of judgment. In the recent case of *Lady de la Pole* v. *Dick* (5) the Court of Appeal expressed approval of *Lawrence* v. *Harrison* (1), and Cotton, L.J., interpreted that case as deciding that the retainer continues "until the judgment has been worked out."

(1) Style, 426.
(2) 6 M. & G. 827.
(3) 6 M. & G. at p. 849.
(4) 15 M. & W. 88.
(5) 29 Ch. D. 351.

1887

JAMES v. RICKNELL.

In *Hamlyn* v. *Betteley* (1), Lord Selborne, C., delivering the judgment of the Court of Appeal, said: "Interpleader is not an action either in the strict or any conventional sense . . . . it is a proceeding in an action and not an action in itself." In other words, interpleader is a mode of "working out" the judgment.

Rose Innes, for the defendant, was not heard.

WILLS, J. I am of opinion that this appeal should be dismissed. The plaintiff acting as a solicitor under the retainer of his client was authorized to use all ordinary means for the recovery of the debt. This retainer covered the proceedings in the original action up to judgment and execution. Proceedings in interpleader are substantially a second action, and nothing but very strong authority would induce me to hold that the plaintiff as a solicitor had any right to embark in them without express instructions from his client. The argument which has been addressed to us for the plaintiff has only shewn that the retainer of a solicitor is not, as was formerly supposed, determined by the recovery of judgment, but extends to execution. When execution has been levied the solicitor has done all that he was employed to do under his retainer. If a claimant then intervenes, the question arises whether it is worth the client's while to contest the claim, and on this question the client is clearly entitled to exercise his own judgment. As a reasonable man he may well decide to give way and to refuse to stake the cost and anxiety of a second litigation against the chance of success. The fact that proceedings in interpleader are a second litigation is not disposed of by suggesting that for some technical purpose they are regarded as part of the original action. Names are nothing. Interpleader at the instance of the sheriff is not a natural consequence of a judgment in favour of the plaintiff in an action. It is another proceeding, and it rests with the plaintiff to say whether he will or will not become a party to the new issue.

GRANTHAM, J. I am of the same opinion. If the precise point has not been already settled, I think we may very safely declare the law to be that under an ordinary retainer a solicitor is not

(1) 6 Q. B. D. 63.

entitled to engage in proceedings in interpleader without consulting his client and receiving special instructions. The only authority which the industry of counsel has discovered to the contrary is the dictum of Lord Selborne in *Hamlyn* v. *Betteley* (1) to the effect that interpleader is "not an action, but a proceeding in an action." This dictum, however, refers not to the present question, but to the forms of procedure under the Interpleader Acts.

Appeal dismissed.

Solicitor for the plaintiff: *R. Robinson.*

Solicitor for defendant: *H. P. Cobb.*

H. D. W.

THE QUEEN *v.* THE JUDGE OF THE COUNTY COURT OF LINCOLNSHIRE AND DIXON.

Dec. 6.

Receiver—Fund in Discretion of Trustees—Order against Trustees for Payment—Excess of Jurisdiction—Prohibition.

An order was made, in an action in a county court, appointing a receiver to receive the interest of a sum of money in the hands of trustees, and ordering the trustees to pay a specific amount out of the interest to the receiver half-yearly until the judgment in the action should be satisfied.

The trustees were trustees of a will, by which they were directed to set apart and invest the sum in question, and were authorized, at their absolute discretion, from time to time, and at such time or times as they should think proper, to pay or apply the whole or any part of the income to or for the benefit of the judgment debtor in such a manner in all respects as they should think proper.

The trustees applied for a prohibition:—

Held, that, as it depended on the discretion of the trustees whether anything should be paid to the judgment debtor, the receiver could not be entitled to receive the interest in their hands, and that an order for payment could not be made against the trustees, who were strangers to the action, and therefore the county court judge had exceeded his jurisdiction, and the proper remedy was by prohibition.

APPLICATION by the executors and trustees of the will of William Hargrave, deceased, for a prohibition, directed to the judge of the County Court of Lincolnshire, at Gainsborough, and the plaintiff in an action of *Dixon* v. *Grylls* in that court, to prohibit any proceedings on an order which had been made by the judge, on the application of the plaintiff, who had recovered judgment in the action.

(1) 6 Q. B. D. 63.

1887

THE QUEEN v. JUDGE OF COUNTY COURT OF LINCOLNSHIRE.

The order was as follows:—

"It is ordered that the registrar of the court be appointed to receive the interest of the sum of 1000*l.* in the hands of the executors, and directed by the will to be dealt with as is therein provided, and the said executors are ordered to pay every half-year as it becomes due the sum of 10*l.*, part of the interest of the said sum of 1000*l.*, until the judgment in this action is fully satisfied."

The clause in the will, under which the executors and trustees were entitled, was in the following terms:—

"I direct my said trustees to set apart and invest the sum of 1200*l.*, part of my said residuary estate, and I authorize my said trustees at their absolute discretion from time to time, and at such time or times as they shall think proper, ... to pay or apply the whole or any part of the income of the said sum of 1200*l.* to or for the benefit of my nephew Harvey De Courcy Grylls in such a manner in all respects as my said trustees shall think proper."

The testator's estate proving insufficient to satisfy all bequests, the amount invested was only 1000*l.*

Harvey De Courcy Grylls was the defendant in the action of *Dixon* v. *Grylls.*

The application for the prohibition was made by a summons, which was referred by the Judge at Chambers to the Court.

C. A. Russell, for the executors, in support of the application. This is an interlocutory order, from which no appeal lies: 13 & 14 Vict. c. 61, s. 14; *Mason* v. *Wirral Highway Board* (1); *McHardy* v. *Liptrott.* (2) The proper remedy, therefore, is prohibition, for otherwise there is no remedy. The judge has assumed jurisdiction by putting the wrong construction on the terms of the will, that is, by an erroneous decision on a point of law, and in such a case the Court will grant a prohibition: *Elston* v. *Rose.* (3) The money in the hands of the trustees of the will was not payable to the defendant in such a way that a receiver could be appointed to receive it; it is entirely in the discretion of the trustees

(1) 4 Q. B. D. 459. (2) 19 Q. B. D. 151.
(3) Law Rep. 4 Q. B. 4.

whether they pay anything to the defendant or not. The bankruptcy cases are not in point, for here the receiver can be in no better position, as regards title to the fund, than the defendant. There was clearly no jurisdiction to make the latter part of the order directing the trustees to pay a definite sum to the receiver, the trustees not being parties to the action. In *Underhay* v. *Read* (1), Manisty, J., questioned the jurisdiction to make a somewhat similar order, but it became unnecessary to decide the point, for the order was set aside on the merits.

John Chester, for the plaintiff. The county court clearly has jurisdiction to appoint a receiver, and the proper mode of reviewing the order is by appeal. In construing the will the judge has decided a question of law that is within his jurisdiction, and if the trustees are affected by his order they can appeal from it.

The county court judge was right in coming to the conclusion that, notwithstanding the discretion conferred upon the trustees by the terms of the will, the judgment debtor had such an interest in the fund as could be made available for the benefit of his creditors: *Snowdon* v. *Dales*. (2)

POLLOCK, B. This is an application to prohibit the judge of the County Court of Lincolnshire, and the plaintiff in an action in that court, from acting on an order made in the action by the judge. The order is a proceeding by way of equitable execution, for it is an order appointing a receiver, and it includes a direction to the trustees to pay certain money to the receiver. In the first place, it is contended in opposition to the application that the matter is one in which the county court had jurisdiction, and therefore the remedy is by appeal. The answer to this contention is that the order is an interlocutory order, from which there is no appeal, and in my opinion this view is well founded. The question depends on the construction of statutes, for the county court is the creature of statute. The Court was first created by 9 & 10 Vict. c. 95, and a right of appeal was first given by 13 & 14 Vict. c. 61, s. 14. A further right of appeal by motion was afterwards given by 38 & 39 Vict. c. 50, s. 6. Looking at the language of those two sections, which give a right of appeal,

(1) See post, p. 209. (2) 6 Sim. 524.

1887

THE QUEEN v. JUDGE OF COUNTY COURT OF LINCOLNSHIRE.

Pollock, B.

I am clearly of opinion that their provisions do not include or apply to a mere interlocutory order. But this application is founded on an alleged excess of jurisdiction. According to the well-known old rule of common law, "the King's Courts that may award prohibitions, being informed, either by the parties themselves or by any stranger, that any Court, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same, as well after judgment and execution as before." (1) In many of the older cases it has been held that where a judge of an inferior Court purported to give himself jurisdiction by misconstruing an Act of Parliament, the superior Court would interfere by prohibition. That is not this case, but this case depends on the same principle, for here the county court judge came to the conclusion on the construction of the will that the words of that will gave him jurisdiction to make this order not only as against the defendant in the action but also as against the trustees. It was contended by Mr. Chester that if it is once shewn that there was jurisdiction, and then a document is construed wrongly, and in consequence of so construing it the judge exceeds his jurisdiction, the High Court cannot interfere by prohibition. I am of opinion that this contention is wholly untenable. Generally it is impossible to ascertain before the matter arises that there will be an excess of jurisdiction, as, for instance, in a case where title to land is involved, where the county court judge cannot tell whether he has jurisdiction or not until the value of the land has been ascertained. The judge ought to go on with the inquiry until he has ascertained that if he goes any further he will exceed his jurisdiction, and then he ought to stop, for if he goes further he will render himself liable to a prohibition. More shortly stated the principle is this: a judge cannot give himself jurisdiction by construing an Act of Parliament or a document wrongly.

Applying this principle to the circumstances of the present case, we find that there is no case in which a receiver has been directed to receive a sum the payment of which to the debtor is wholly contingent and dependent on the will of another person.

(1) 2 Inst. 602. cited in Shortt on Informations, Mandamus and Prohibition, 449.

Moreover, so far as the order affects the trustees, who are strangers to the action, there is no precedent for an order directing trustees to pay money contrary to the trusts of the will and the intention of the testator. The case of *Pink* v. *De Thuisey* (1) is not unlike the present case with regard to the question of the construction of the will, for in that case a direction that a legacy was to be advanced to a legatee in case of his obtaining an establishment or acquisition, which should seem advantageous to the executor, was held to make the right to the legacy conditional on the obtaining of the establishment or acquisition and the executor's approval.

In the present case an option is given to the trustees to pay the interest to the defendant, or not to pay it, as in their discretion they may think fit. With regard to the position of the parties, it is clear that the trustees are in a better position than the defendant himself would occupy.

For these reasons I am of opinion that the judge had no jurisdiction to make the order in question, and a prohibition must be granted.

HAWKINS, J. I am of the same opinion. No doubt the county court judge had jurisdiction to make an order appointing a receiver of funds of which the defendant himself had the right to the control, or which he had the right to receive; but that is not the order which has been made in the present case, for this order authorizes the receiver to take that which the trustees alone have power to receive and deal with in their discretion. There is no jurisdiction to do this. As to the rest of the order, directed to the trustees and ordering them to pay the interest to the receiver, I cannot conceive how it can be supported. As to ordering the trustees to pay to the receiver, such an order is made absolutely without jurisdiction.

Order for prohibition.

Solicitors for the executors: *Bower, Cotton, & Bower, for A. Credland, Gainsborough.*

Solicitors for plaintiff: *Scott & Co.*

(1) 2 Madd. 157.

P. B. H.

1887

Dec. 1.

VINEY *v.* BIGNOLD.

Arbitration—Arbitration Clause—Fire Insurance—Proviso against suing before Arbitration—Condition Precedent.

In an action on a fire policy the defendant pleaded that the policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and the insured should not be entitled to commence or maintain any action upon the policy until the amount of the loss should have been referred and determined as therein provided, and then only for the amount so determined, that a difference had arisen, and the amount had not been referred or determined:—

Held, that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy, and the defence was an answer to the action.

Collins v. *Locke* (4 App. Cas. 674) distinguished.

Argument of a point of law raised by the pleadings.

The action was brought on a policy of fire insurance against the defendant as public officer of the Norwich Union Fire Insurance Society.

The policy was made subject to the terms and conditions thereupon indorsed, which contained the following clauses;

20. "The amount of every loss will be paid without discount or deduction within sixty days after the same shall have been established to the satisfaction of the directors; but the society reserve to themselves, whether as sole insurers or co-insurers with any other company or companies, the option in all cases of re-instating the property, such option to be notified within a reasonable time after the delivery of the accounts and evidence referred to in the preceding condition. The re-instatement to be as near as circumstances will permit, and the same to be sufficient notwithstanding it may not be precisely of the same description, size, quality, or materials, as the property destroyed, provided it be a substantial re-instatement and with materials of an appropriate description and quality."

21. "If any difference shall arise in the adjustment of a loss, the amount (if any) to be paid by the society shall, whether the right to recover on the policy be disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or of two indifferent

persons, one to be chosen by the party insured and the other by the directors. And in case either party shall refuse or neglect to appoint an arbitrator within twenty-eight days after notice, the other party shall appoint both arbitrators; and in case of the arbitrators differing therein, the amount shall be submitted to the arbitration of an umpire to be chosen by the arbitrators before they proceed to act, and the award of the arbitrators or umpire (as the case may be) shall be conclusive evidence of the amount of the loss, and the party insured shall not be entitled to commence or maintain any action at law or suit in equity upon his policy until the amount of the loss shall have been referred and determined as hereinbefore provided, and then only for the amount so awarded. Each party to pay his or their own costs of the reference, and a moiety of the costs of the award and of the arbitrators and umpire, and the reference in all other respects to be subject to such rules and conditions as are usually inserted in orders of reference at nisi prius if the parties differ about the same."

The defence alleged that a difference had arisen, and the amount had not been referred or determined, and the point was set down for argument under the Rules of the Supreme Court, 1883, Order XXV., r. 2.

R. Vaughan Williams, (*Hansell*, with him), for the plaintiff. The defence is no answer to the action. The policy is a contract to pay the amount of the loss, coupled with a provision as to the mode of adjustment, and not a contract to pay the adjusted amount. The two terms of the contract are separate and independent, and the adjustment of the amount is not a condition precedent to the plaintiff's right to enforce his claim upon the contract to pay. This appears to have been the view adopted in *Collins* v. *Locke* (1), which cannot be distinguished from the present case. *Roper* v. *Lendon* (2) is also an authority in the plaintiff's favour; the 10th and 15th clauses in that case correspond to the 20th and 21st here. The words in *Elliott* v. *Royal Exchange Assurance Company* (3) were more favourable

(1) 4 App. Cas. 674. (2) 1 E. & E. 825; 28 L. J. (Q. B.) 260.
(3) Law Rep. 2 Ex. 237.

1887

VINEY v. BIGNOLD.

to the defendant's contention than those of this policy. Here the covenants are collateral and distinct, as in *Dawson* v. *Lord Otho FitzGerald.* (1) The present case does not come within the principle established by the decision of the House of Lords in *Scott* v. *Avery.* (2)

Finlay, Q.C., and *W. Graham*, for the defendant, were not called on.

WILLS, J. The principle on which cases such as the present ought to be decided is very clear, and it is this. The Court must look and see what the covenant is. If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant, but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover. The real question comes to this, what have the parties covenanted to do?

In the present case the insurers have covenanted to insure against loss by fire, subject to the conditions indorsed on the policy. The question turns on the language of the 21st of these conditions, which, after providing for the adjustment by arbitration of the amount to be paid by the insurers in case of a loss, contains this provision, "and the party insured shall not be entitled to commence or maintain any action at law or suit in equity upon his policy until the amount of the loss shall have been referred and determined as hereinbefore provided, and then only for the amount so awarded." The question to be decided is, what is the meaning of this provision? I am of opinion that it means that in case of difference the amount to be paid shall be determined by arbitration, and until this is done no liability shall arise; in short, the condition means what it says; the only contract on the part of the defendants which is applicable where, as in the present case, a difference has arisen is that they will pay such amount as shall be awarded by arbitrators or their umpire. Where, therefore, no arbitration has taken place, no covenant of

(1) 1 Ex. D. 257. (2) 5 H. L. C. 811.

1887

VINEY v. BIGNOLD.

Wills, J.

the defendants has been broken. This appears to be the reasonable construction of the policy, but it is necessary to consider whether there is any authority against this view. I cannot find any such authority, and I do not think that any of the cases cited in argument are inconsistent with this construction. In all those cases except one the language was very different from that used in the present case, and in one case only was the language at all near to that used here. That is the case of *Collins* v. *Locke*. (1) There the parties had agreed to two things, first, that in case of any breach of covenant the party committing the breach should pay 1000*l*. as liquidated damages, and, secondly, that all matters in difference should be submitted to arbitrators. The second of these clauses, under the particular circumstances of that case, was held not to interfere with the right to sue for breach of covenant. At first sight the language of the arbitration clause in that case appears similar to the language used here, but there is a difference, for the agreement in that case, after providing in general terms for a reference, contained the following clause: "And the award of the arbitrators shall be conclusive, and any of the parties shall not be entitled to commence or maintain any action at law or suit in equity *in respect of the matters so submitted as aforesaid*, except for the amount or amounts by the said award determined to be paid by any one or more of the said parties to the other or others of them, or otherwise in accordance with the terms and conditions of the said award, as to the acts or deeds to be made, done, executed, and performed." These words are relied on by Mr. Williams as being identical in substance with the condition in the present case. Sir Montague Smith explained them thus: "This passage, no doubt, contains negative words, but there is ambiguity in the words 'in respect of the matters so submitted as aforesaid,' as to whether they were meant to apply to all matters which were to be submitted to arbitrators under the clause, or to the matters which, after they arose, had been specifically submitted in the manner prescribed." (2) He then proceeded to consider clause 9 of the agreement, which provided for payment of liquidated damages in case of breach of covenant, and continued as

(1) 4 App. Cas. 674. (2) 4 App. Cas. 690.

1887

VINEY v. BIGNOLD.

Wills, J.

follows: "It may be inferred from this clause that the parties contemplated that an action might be brought for these damages, and with reference to the proviso to the clause, that they intended to reserve the right to bring a suit for specific performance. Their Lordships are, therefore, disposed to think that the negative words in the arbitration clause were only intended to apply to matters actually submitted to arbitration. They will not, therefore, disturb the judgment of the Court below on this point." (1) The matters in respect of which the action was brought were indeed embraced by the general covenant to refer, which applied to all disputes which might arise; but they had not been made the subjects of specific submission to arbitration, and the Court below had held that the covenant to refer was independent of the covenant on which the plaintiff sued, and this view was adopted by the Judicial Committee of the Privy Council, because they held that the negative words did not apply unless the matter in question had, in pursuance of the clause, been made the subject of specific submission; but had the negative language in the arbitration clause applied to the matters then under discussion the decision would have been the other way. In the present case the words "The party insured shall not be entitled to commence or maintain any action until the amount of the loss shall have been referred and determined," shew clearly that until this has been done there can be no liability.

GRANTHAM, J. I am of the same opinion, and I think that all the authorities are opposed to the contention put forward on behalf of the plaintiff. I agree with the observations of Wills, J., as to *Collins* v. *Locke*. (2) That decision is strongly in favour of the defendants. In *Roper* v. *Lendon* (3) the condition was very different from this, and it seems not improbable that the present form was adopted in consequence of that decision. *Elliott* v. *Royal Exchange Assurance Co.* (4) is also in point, and contains nothing that supports the plaintiff's contention except the opinion of Bramwell, B., who dissented from the judgment of the majority

(1) 4 App. Cas. 690, 691.
(2) 4 App. Cas. 674.
(3) 1 E. & E. 825; 28 L. J. (Q. B.) 260.
(4) Law Rep. 2 Ex. 237.

of the Court. The language used by Jessel, M.R., in *Dawson* v. *Lord Otho Fitzgerald* (1) does not in any way conflict with the view which we take. There were in that case two distinct and independent covenants, first to keep only a limited number of hares and rabbits, and, secondly, in case of injury to the trees or crops, to pay compensation, to be assessed by arbitrators; the decision therefore does not apply. Looking at the language of the 20th and 21st conditions indorsed on this policy, it is clear that no action can lie except for the amount ascertained in the manner provided. The defence alleges that after the fire took place a difference arose, and it was not adjusted by arbitration. That is a complete answer to the plaintiff's claim.

Judgment for the defendant.

Solicitors for plaintiff: *Clapham & Fitch.*

Solicitors for defendant: *Hollams, Son, & Coward.*

P. B. H.

DEUTSCHE SPRINGSTOFF ACTIEN GESELLSCHAFT *v.* BRISCOE. *Nov.* 3.

Arbitration—Staying Proceedings—General Agreement to refer future Disputes—Submission to particular Arbitrators—Revocation, Effect of—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.

An arbitration clause in an agreement between the plaintiffs and the defendant provided that, if any dispute should arise between the parties touching that agreement, the dispute should be referred to two named arbitrators, or their umpire, the provisions of the Common Law Procedure Act, 1854, to apply to the reference. A dispute having arisen in respect of moneys alleged to have become due and payable from the defendant to the plaintiffs under the agreement, the defendant gave notice to proceed to arbitration. The plaintiffs thereupon brought an action for the moneys and revoked their submission to the arbitrators:—

Held, that the defendant was not entitled to have the proceedings in the action stayed under s. 11 of the Common Law Procedure Act, 1854, because after the plaintiffs' revocation of the submission, there was, in respect of the particular dispute which had arisen, no subsisting agreement to refer capable of being carried into effect.

MOTION by way of appeal from the decision of Pollock, B., at chambers, refusing to stay proceedings in an action.

The plaintiffs carried on business in Germany as manufacturers

(1) 1 Ex. D. 257.

1887

DEUTSCHE SPRINGSTOFF ACTIEN GESELLSCHAFT v. BRISCOE.

of explosive materials; and the action was brought to recover sums alleged to be payable by the defendant, as their agent, under an agreement dated April 30, 1883, and made between the plaintiffs and the defendant.

The 14th clause of the agreement was:—

"If any dispute, question, difference, or controversy, shall arise between the parties hereto, or their respective successors, executors, or administrators, touching this agreement, or any clause, matter, or thing herein contained, or the construction hereof, or anything to be done under any of the clauses herein contained, or any matter in any way connected with this agreement, or the operation thereof, or the agreement herein contained, or the respective rights, duties, or liabilities of either party in connection with the premises, then and in every such case the matter in difference shall be referred to the said S. B. Smith and A. F. Warr, or their umpire, pursuant to and so as with regard to the mode and consequence of the reference and in all other respects to conform to the provisions in that behalf contained in the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof, and such arbitrators or their umpire shall have power to award and determine how and by whom the costs of the reference are to be paid."

Disputes having arisen between the plaintiffs and the defendant with respect to moneys alleged to be payable under the agreement, the defendant, on November 10, 1886, gave the plaintiffs notice that he required to proceed to arbitration. The plaintiffs issued their writ in the action on June 23, 1887. On July 16 the defendant took out a summons to stay proceedings in the action under s. 11 of the Common Law Procedure Act, 1854, and on July 23 the plaintiffs revoked the submission to, and authority of, the named arbitrators.

A master in chambers having ordered a stay of proceedings, Pollock, B. reversed his order, and the defendant appealed.

A. J. Ashton, for the defendant. This is a general agreement to refer all future disputes to arbitration, and cannot therefore be revoked: *Piercy* v. *Young*. (1) The fact that particular

(1) 14 Ch. D. 200.

arbitrators are named in the agreement makes no difference. The effect is that from time to time as the disputes arise there is a submission to the named arbitrators in respect of those disputes: *Parkes* v. *Smith*. (1) [Judgment of Lord Campbell, C.J., at p. 309.] Here the revocation only operated with respect to the submission to the particular arbitrators: the general agreement to refer remains untouched, and cannot be revoked: *Fraser* v. *Ehrensperger*. (2) Sect. 11 of the Common Law Procedure Act, 1854, therefore applies, and the defendant is entitled to a stay of proceedings. *Randell* v. *Thompson* (3) is no authority against this contention for the defendant. The judgment of Blackburn, J., in the Court below assumes that an agreement to refer was left after the submission to a particular arbitrator had been revoked. The Court of Appeal reversed the decision of the Queen's Bench Division on the ground that in that case there was no existing agreement to refer capable of being carried into effect, but there is nothing in their judgments to negative the proposition that there might be a general agreement to refer, which could not be revoked, together with a submission to particular arbitrators which could. *Mills* v. *Bailey* (4) does not apply here. The defendant in that case revoked the submission, and the decision only was that, an award having been made by an arbitrator to whom the defendant would not agree, that award was bad.

Bremner, for the plaintiffs. It is conceded that a general agreement to refer all disputes which may arise between the parties cannot be revoked: but where there are named arbitrators, as in this case, the agreement is not a general agreement to refer. There is no power to revoke a general agreement to refer, because, no arbitrators being named, there is no one whose authority can be revoked; but the authority of any named arbitrator may be revoked by either of the parties at any time before he makes his award: *In re Rouse & Meier* (5), *Piercy* v. *Young* (6), and *Fraser* v. *Ehrensperger* (2), do not apply, because no arbitrators were named in either of those cases. If, as is conceded, the

(1) 15 Q. B. 297.
(2) 12 Q. B. D. 310.
(3) 1 Q. B. D. 748.
(4) 2 H. & C. 36.
(5) Law Rep. 6 C. P. 212.
(6) 14 Ch. D. 200.

1887

DEUTSCHE STRINGSTOFF ACTIEN GESELLSCHAFT v. BRISCOE.

revocation by the plaintiffs of the submission to the named arbitrators was valid quâ the particular disputes which had arisen, it follows that there can be no determination of those disputes by any tribunal, unless the plaintiffs can bring their action, because they are under no agreement to refer to any but the named arbitrators. There is, therefore, no subsisting agreement under which those disputes can be referred—no "agreement capable of being carried into effect," within the words used by Mellish, L.J., in *Randell* v. *Thompson*. (1) It is submitted that the principle of that case, and of *Mills* v. *Bailey* (2), applies here. Sect. 11 of the Common Law Procedure Act, 1854, has, therefore, no application, and proceedings in the action ought not to be stayed.

A. J. Ashton, replied.

STEPHEN, J. The defendant's case has been argued with great ingenuity, but I think that some passages of the judgments in *Randell* v. *Thompson* (1) furnish the principle upon which we ought to decide this case. It was there held by the Court of Appeal that, in order to make the provisions of s. 11 of the Common Law Procedure Act, 1854, apply, there must be a subsisting agreement to refer capable of being enforced. Here the agreement to refer is certainly general in one sense, but it is not general with respect to the appointment of arbitrators. A dispute clearly within the agreement having arisen, if nothing further had happened there was a submission to the particular arbitrators named in the agreement to refer. Now that submission could be, and has been, revoked. It was argued for the defendant that he could then fall back upon the agreement, and treat it as a general subsisting agreement to refer; that, though the plaintiffs could revoke the submission to the named arbitrators, they could not revoke that general agreement, and that the defendant was therefore entitled to stay proceedings in their action. That does not commend itself as being a very reasonable result. I think the true view is that there is a general subsisting agreement to refer all matters in difference, under which agreement the differences, when and as they arise, may be referred to the named

(1) 1 Q. B. D. 748. (2) 2 H. & C. 36.

1887

DEUTSCHE SPRINGSTOFF ACTIEN GESELLSCHAFT v. BRISCOE.

Stephen, J.

arbitrators, but the submission to those arbitrators is revocable. If that be so, I am of opinion that, with respect to the particular dispute which has arisen, the submission having been revoked, there is no subsisting agreement to refer capable of being enforced. It may be that a reference may be enforced under the agreement with respect to future disputes, but my decision is only with respect to the particular dispute which has arisen. I am, therefore, of opinion that this case is not brought within s. 11; that the decision of Pollock, B., was right, and that this motion ought to be refused.

CHARLES, J. I am of the same opinion. In one sense, no doubt, this is a general agreement to refer all disputes or matters in difference, but in another sense the agreement is not general, because it is an agreement to refer to two named persons. A matter in difference having arisen, if nothing else happens, there is a submission to those two persons in respect of that matter in difference. Here the submission has been revoked. I therefore think that, with respect to the particular dispute which has arisen, there is no agreement to refer capable of being enforced; and, as I understand the judgment of the Master of the Rolls in *Randell* v. *Thompson* (1), under such circumstances s. 11 of the Common Law Procedure Act, 1854, does not apply. I agree that the appeal should be dismissed.

Motion dismissed.

Solicitors for plaintiffs: *Ashurst, Morris & Co.*
Solicitors for defendants: *F. Venn & Co.*

W. A.

(1) 1 Q. B. D. 748.

1887
Dec. 10.

[CROWN CASE RESERVED.]

THE QUEEN *v.* BUCKMASTER.

Criminal Law—Larceny—Money deposited to abide Event of a Wager—Property remaining in Depositor—Possession obtained by Fraud—Larceny by a Trick.

The prisoner was at a race-meeting offering to lay odds against different horses. He made a bet with the prosecutor laying odds against a particular horse, and the money for which the prosecutor backed the horse was deposited with the prisoner. The prosecutor admitted that he would have been satisfied if he did not receive back the same coins. The horse won, but the prisoner went away with the money, and afterwards when the prosecutor met him he denied that he had made the bet.

The prisoner was convicted of larceny, and a case was reserved, the question being whether there was any evidence to be left to the jury :—

Held, that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to repay it in any event, there was no contract by which the property in the money could pass, and therefore there was evidence of larceny by a trick.

CASE stated by the chairman of the Berkshire quarter sessions.

The prisoner was tried upon an indictment which charged that he did feloniously steal, take, and carry away certain money of the moneys of John Rymer.

It was proved that the prisoner and another man, during the Ascot Race meeting, were standing upon a platform, or stand, made to represent "safes" or iron safe chests. The words "Griffiths the Safe Man," were printed upon it. The stand was outside the course, on a spot on Ascot Heath, where carriages were placed, and was not within any betting inclosure or ring.

The prisoner with a book in his hand was calling out "2 to 1 against the field." Just before a race was about to be run the prosecutor went up to him, and asked "What price Bird of Freedom?" to which he replied "7 to 1 to win." The prosecutor then deposited 5*s.* with the prisoner, who told him that if the horse won he (the prosecutor) would win 35*s.*, and get his own 5*s.* back. He also deposited another 5*s.* with the prisoner, who told him that he would have 15*s.* back, including his own 5*s.*, if the

horse was first or second. The man who was with the prisoner, and was acting with him, received the money, and the latter, with whom all the conversation took place, appeared to take down the bet in his book, and gave the prosecutor a card ticket with the words "Griffiths Safe Man" upon it.

While the race was being run the prisoner and the other man were seen by one of the witnesses to walk quietly away. They were followed for about twenty yards, and on the witness at once returning the stand was gone.

The horse "Bird of Freedom" won the race, and thereupon the prosecutor went back to the place where the stand had been, and he found that the prisoner and the other man had gone. He waited there for half-an-hour, and then left. Later in the afternoon the prosecutor saw the prisoner on another part of Ascot Heath, and said "I want 2*l.* 15*s.* from you." The prisoner said he knew nothing about it. Upon being told by the prosecutor that he would be detained, he admitted the bet, and said he had not the money, but that he was only the clerk, and could take the prosecutor to the man who had it. He was then taken into custody, and upon him were found card tickets with the words "Griffiths the Safe Man" upon them.

It was elicited from the prosecutor in cross-examination that he would have been satisfied if he did not receive back the same particular coins he had deposited.

On behalf of the prisoner it was submitted that the prosecutor, having parted voluntarily with the money, there was no evidence of larceny, nor of any taking by the prisoner, and none of obtaining by false pretence or trick.

No evidence was called on the part of the prisoner.

A verdict of guilty was returned.

The question for the opinion of the Court was whether there was any evidence to be left to the jury.

Keith Frith, for the prisoner. There was no evidence on which the prisoner could rightly be convicted of larceny. It is clear that he was not guilty of larceny as a bailee within the meaning of 24 & 25 Vict. c. 96, s. 3. Neither was he guilty of larceny at common law, for the prosecutor when he deposited the money

1887

THE QUEEN v. BUCKMASTER.

intended to part with the property in the specific coins which he handed over. This is clear from his own statement that he would have been satisfied if he did not receive back the same particular coins he had deposited. What the prisoner did could not be larceny by a trick; if he was guilty of any crime he was guilty of obtaining the money by false pretences. The distinction is pointed out by Parke, B., in *Powell* v. *Hoyland* (1) thus: "If a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." That covers the present case. Either the prosecutor parted with the property in the money in consequence of a false pretence of an existing fact, or he was induced to part with it by the prisoner's promise to pay if the horse won the race, in which case there was no crime at all. If the horse had not won the prisoner would have been entitled to retain the money, and in that event he could not have been guilty of larceny, and the fact that the horse won can make no difference, for the guilt or innocence of the prisoner cannot depend on the result of the race.

No counsel appeared for the prosecution.

LORD COLERIDGE, C.J. I am of opinion that the conviction ought to be affirmed.

The only question left to us by the case is whether there was any evidence to be left to the jury of larceny. I am of opinion that there was abundant evidence.

It was argued on behalf of the prisoner that the money was intended to be parted with, that is, that the prosecutor intended to part with, not only the possession of the money, but the property in the money, and consequently that the taking by the prisoner was not larceny, but obtaining money by false pretences, if it was a crime at all, in other words, that it was false pretences or nothing.

To this contention there are two answers, both of them founded on good sense and supported by authority.

In the first place, supposing there was an intention on the

(1) 6 Ex. 67, at p. 70.

part of the prosecutor to part with the property in the money, in order to pass that property from the prosecutor to the prisoner there must be a contract, that is, the bringing together of two minds, but here there was nothing in the shape of a contract by which the property could pass, for if the prosecutor meant to part with the money, it was on the terms that the prisoner should do something with it, that is, should return the money to the prosecutor if the horse won. But the prisoner did not do so, and never intended to do so. The facts here are somewhat similar to those in *Oliver's Case* (1), where the prisoner offered to procure gold for the prosecutor in exchange for bank notes, whereupon the prosecutor put down 35*l.* in notes for the purpose of receiving back their amount in gold, and the prisoner took up the notes and went out of the house with them, promising to return immediately with the gold, but did not return. It was argued that the prosecutor intended to part with the property, but "Wood, B., held that the case clearly amounted to larceny, if the jury believed that the intention of the prisoner was to run away with the notes, and never to return with the gold; and that whether the prisoner had, at the time, the animus furandi was the sole point upon which the question turned; for if the prisoner had, at the time, the animus furandi, all that had been said respecting the property having been parted with by the delivery was without foundation, as the property, in truth, had never been parted with at all. The learned judge further said that *a parting with the property in goods could only be effected by contract, which required the assent of two minds*; but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having the gold in return; and the prisoner never meaning to barter, but to steal." (2) That appears to me to be both good sense and sound law, and to be applicable to the present case, even assuming that there was here an intention to part with the property.

But, secondly, I think the true view is that the property in the money was not intended to pass to the prisoner.

(1) 2 Russell on Crimes, 169, 170, 5th Ed., cited in *R.* v. *Walsh* (4 Taunt. at pp. 274, 275; 2 Lea. C. C. at pp. 1072, 1073.

(2) 2 Russell on Crimes, 170, 5th Ed.

1887

THE QUEEN v. BUCKMASTER.

Lord Coleridge, C.J.

In *Rex* v. *Robson* (1) the circumstances were even more like those of the present case. There "the prosecutor was drawn in to deposit twenty guinea notes on a bet that one of the prisoners could not guess right three times successively on the hiding of a halfpenny by another of the prisoners under a pot; he put the notes in the hands of one of the prisoners, and then, the other guessing right, the notes were handed over. The question was left to the jury whether, at the time the notes were taken, there was not a plan between the prisoners that they should be kept, under the false colour of winning a bet; and the jury so found. Upon a case reserved, the judges held that the conviction was right, because at the time of the taking the prosecutor parted with the possession only." (2) It was held there that the taking was felonious, because the parting with the money was obtained by fraud, and only the possession and not the property passed. Bayley, J., when reserving the case for the consideration of the judges, pointed out that at the time the prisoners took the prosecutor's notes, the latter parted with the possession only, not with the property; and that the property was only to pass eventually if Gill (the man with whom the prosecutor made the bet) *really* won the wager. The prosecutor expected to have been paid had Gill guessed wrong. (3)

I am of opinion that the true view of the present case is exactly what was there stated. Here the prosecutor deposited the money with the prisoner, not intending to part with the property, for he was to have his money back in a certain event, whereas the prisoner when he received the money never intended to give it back in any event. It is true that the prosecutor would have been satisfied if he had received back, not the identical coins which he deposited, but other coins of equal value, but that does not shew that he meant to part with his right to the money. In my opinion the evidence clearly shews that he meant to do nothing of the kind.

For these reasons I think the prisoner was properly convicted.

POLLOCK, B., concurred.

(1) MS. Bayley, J.; R. & R. 413.
(2) 2 Russell on Crimes, 176; from MS. of Bayley, J. (3) R. & R. at p. 414.

1887

THE QUEEN v. BUCKMASTER.

MANISTY, J. On the authorities it is settled law that if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny.

Here the prosecutor never intended to part with the property, and the prisoner had the animus furandi at the time when he received the possession.

HAWKINS, J. The only question is whether there was any evidence of larceny to be left to the jury. I am of opinion that there was abundant evidence. The whole of the prisoner's conduct shews a preconcerted design to get the money fraudulently.

A. L. SMITH, J. The prosecutor never intended to part with his money except for a bonâ fide bet. There is also evidence that possession of the money was obtained by a preconcerted premeditated trick. There is therefore evidence of larceny at common law.

Conviction affirmed.

Solicitor for prisoner: *Bassett.*

P. B. H.

[CROWN CASE RESERVED.]

Dec. 10.

THE QUEEN *v.* BECKLEY AND OTHERS.

Justices—Jurisdiction—Offence committed in one Petty Sessional Division of a County—Committal in different Division of same County.

Justices of the peace sitting in and acting for one petty sessional division of a county have jurisdiction to commit for trial on a charge arising in another petty sessional division of the same county, and are not bound to remand such charge for hearing in the division in which the offence was committed.

CASE stated by the chairman of quarter sessions for the county of Cambridge.

The defendants were tried and convicted upon an indictment charging them with conspiracy.

When the defendants were called upon to plead it was objected that the indictment ought to be quashed, as the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17), s. 1,

1887

THE QUEEN v. BECKLEY.

which it was conceded applied to the offence charged in the indictment, had not been complied with.

The offence with which the defendants were charged was committed at Swaffham Prior, in the county of Cambridge, a place within the petty sessional division of Bottisham, in the said county.

The defendants were arrested at various places not within the county upon a warrant, which, after reciting that an information had been sworn against the defendants, commanded the constables of Cambridgeshire to apprehend the defendants and bring them before the justice who signed the warrant, or such other justices for the county of Cambridge as should be present at the police station, Bottisham, to answer the information, and be further dealt with according to law.

The justice who signed this warrant resided and usually acted within the petty sessional division of Cambridge in the said county.

The defendants were on July 6 remanded by a justice of the peace for the county residing within and usually acting for the Cambridge division of that county, and ordered by his warrant to be brought up on July 9 at the Shire Hall, Chesterton, the place for holding the petty sessions for the division of Cambridge, and on July 9 the case was partly gone into, and they were further remanded until July 16 to the same petty sessional division. On July 16 further evidence was given on behalf of the prosecution at the petty sessions held at Chesterton, when it was for the first time objected on behalf of the defendants that the justices sitting at Chesterton had no jurisdiction to hear and determine a case arising within another petty sessional division, viz., at Bottisham, and that the justices were bound to remand the case for hearing at Bottisham according to the terms of the warrant.

The justices overruled the objection, and sitting within the petty sessional division of Cambridge at Chesterton heard and determined the case, and committed the defendants for trial.

Of the justices who so heard and determined the case one only was a justice who resided within and occasionally acted within the Bottisham petty sessional division.

1887

THE QUEEN v. BECKLEY.

It was contended on the part of the defendants that by virtue of 9 Geo. 4, c. 43, s. 6, it was not competent for the justices sitting at the Cambridge petty sessional division at Chesterton to hear or determine or to send for trial a case arising within another petty sessional division of the county, and that the justice in remanding the defendants on July 6 to the Cambridge division was acting without jurisdiction, and that for these reasons the provisions of the Vexatious Indictments Act had not been complied with; consequently that the indictment ought to be quashed.

The chairman overruled the objection, and refused to quash the indictment.

The question for the Court was whether he was right in law in so holding, if so the convictions to stand, otherwise to be quashed.

J. W. Cooper, for the defendants. The chairman was wrong in refusing to quash the indictment. The defendants ought to have been remanded to the petty sessional division of Bottisham, in accordance with the terms of the warrant. This charge was a matter or thing which arose in the Bottisham division, and it ought to have been heard and dealt with in that division: 9 Geo. 4, c. 43, s. 6; 11 & 12 Vict. c. 42, ss. 11, 22. This being so, the justices in the Cambridge division had no jurisdiction to deal with the case, and therefore the committal in that division was not a compliance with the requirements of the Vexatious Indictments Act (22 & 23 Vict. c. 17), s. 1.

[HAWKINS, J., referred to *Reg.* v. *Hughes.* (1)]

No counsel appeared for the prosecution.

LORD COLERIDGE, C.J. I am of opinion that the conviction was right and ought to be affirmed.

The objection which is taken is that the offence was committed in a certain petty sessional division of the county of Cambridge, and the offenders were charged before justices acting for another petty sessional division of the same county, and that the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17), s. 1, could not be duly complied with unless the justices

(1) 4 Q. B. D. 614.

1887

THE QUEEN v. BECKLEY.

hearing and determining the charge were justices of that petty sessional division in which the offence was committed. This argument was supported by reference to statutory provisions dealing with cases of offences committed in other counties than those in which the justices have jurisdiction; but those Acts of Parliament are founded on principles different from those applicable to the present case; for here the offence was committed in the county of Cambridge, and the justices have jurisdiction throughout the county. It is contended that the offence cannot legally be dealt with by magistrates acting in a different petty sessional division from that in which the offence was committed, but there is no such rule of law; for in dealing with an offence committed in the county the magistrates for the county have jurisdiction throughout the county, and there is nothing in the Vexatious Indictments Act to limit their power to hear and determine the case. Although a similar state of facts must often have occurred, this is the first occasion on which such a point has been taken, and any doubt which may have existed ought to be finally laid at rest by the unanimous decision of this Court that there is nothing in the objection.

POLLOCK, B. I am of the same opinion, and I only wish to add that there is nothing in 9 Geo. 4, c. 43, to interfere with the general power of magistrates to act throughout the county. The preamble to the statute makes the meaning of s. 6 perfectly clear. The cases collected in Burn's Justice, title "Justices of the Peace," vii., 1 (vol. 3, pages 130, 131, in the 30th edition), shew that the law is very jealous to preserve the jurisdiction of magistrates, and their authority is not to be cut down without an express provision to that effect.

MANISTY, J. I am of the same opinion. Sect. 22 of Jervis's Act (11 & 12 Vict. c. 42), which was relied upon for the defendants, has no analogy to the present case, for that enactment was passed for the purpose of meeting the case of an offence having been committed in one county and the offender being brought before the magistrates of another county. In such a case they may commit him for trial in the county in which the offence was

committed, but there is no analogous statutory provision applicable to the case of an offence being committed in one petty sessional division of a county and the offender being brought before justices acting in another petty sessional division of the same county.

1887

THE QUEEN v. BECKLEY.

HAWKINS and A. L. SMITH, JJ., concurred.

Convictions affirmed.

Solicitors for defendants: *Ellison & Burrows, Cambridge.*

P. B. H.

THE GUARDIANS OF THE MEDWAY UNION, APPELLANTS; THE GUARDIANS OF THE BEDMINSTER UNION, RESPONDENTS.

Dec. 2.

Poor Law—Settlement—Residence as Wife and Widow—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35—9 & 10 *Vict. c.* 66, *s.* 1—*Union Chargeability Act*, 1865 (28 & 29 *Vict. c.* 79), *s.* 8.

The pauper resided continuously for three years in a parish in the appellant union, two years and nine months with her husband as his wife, and three months after his death as a widow:—

Held, that the two periods of residence could be put together to make up the term of three years' residence required by s. 34 of the Divided Parish Act, 1876 (39 & 40 Vict. c. 61), and that the widow had acquired a settlement in the appellant union.

UPON appeal to the Bristol quarter sessions against an order of justices for the removal of Caroline Baker, widow, and her three children, aged respectively five, three, and two years, to the appellants' union as the place of their last legal settlement, the recorder confirmed the order subject to a case.

The order purported to be made under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61). (1)

The appellants admitted that the pauper and her husband had

(1) By the Divided Parishes Act, 1876 (39 & 40 Vict.), c. 61, s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the statutes in that behalf render him irremoveable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise."

By s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except

1887

GUARDIANS OF MEDWAY UNION v. GUARDIANS OF BEDMINSTER UNION.

lived together and had resided continuously in the parish of Gillingham in the appellants' union for two years and nine months immediately before the death of the husband, which took place in March, 1886, and that for upwards of three months next ensuing she had continuously resided in the same parish as a widow. They did not dispute that if the order of removal was good as regards her it was also good as regards her children.

The Appellants contended (1) that s. 34 of the Divided Parishes Act, 1876, did not apply, because the pauper, throughout the period for which her husband was acquiring a settlement in Gillingham, which enured for her benefit, could not herself have been simultaneously acquiring on her own account a settlement as if she had been a feme sole; (2), that s. 35 did not apply, because the pauper having been a widow at the date of adjudication was not then a wife within the meaning of that section.

The respondents contended that s. 34 applied, and that the period of the pauper's residence in Gillingham as a wife coalesced in law with that of her subsequent residence there as a widow, so as to make up the term of three years' residence requisite under that section for the acquirement of a settlement.

The question for the opinion of the Court was whether the order of sessions was right.

Kinglake, (*D. Metcalfe*, with him), for the appellants. The pauper has not acquired a settlement in the appellant union either under s. 34 or under s. 35 of the Divided Parishes Act, 1876. "Any person" in s. 34 means any person who is sui juris. The section has no reference to a married woman or an unemancipated child. A married woman cannot acquire, proprio jure, a status of irremoveability. She can only derive it from her husband. The husband's residence is in law the wife's residence, and a break in the former is a break in the latter: *St. Giles's, Reading* v. *Eversley* (1); *Reg.* v. *Overseers of Manchester*. (2) The time, therefore, of the pauper's residence during coverture cannot be

in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

(1) 1 Str. 580.

(2) 8 Q. B. D. 50.

added to that of her residence as widow in order to make up the three years' residence under the Act. With regard to s. 35, at the time of adjudication the pauper was a widow. This circumstance prevents the operation of s. 35. It is well settled that a derivative settlement as a wife cannot be claimed for any woman under this section except during her husband's lifetime: *Reg.* v. *Bridgnorth* (1); *Reg.* v. *Edmonton* (2); *Maidstone Union* v. *Holborn Union.* (3)

Poole, (*J. Cresswell Wall*, with him), for the respondents. The pauper has acquired a settlement by residence in the appellant union under s. 34. The words "any person" are general. The pauper has "resided for the term of three years" in Gillingham, "in such manner and under such circumstances in each of such years," as would (in accordance with 9 & 10 Vict. c. 66, s. 1, which deals with removals, and the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 8, which shortens the period of residence which produces a status of irremoveability from five years to one year) "render her irremoveable," and is therefore "to be deemed to be settled in such parish." In *Reg.* v. *Inhabitants of Glossop* (4) it was held that where a pauper had resided for five years continuously in a parish first as a wife and afterwards as a widow, the two periods of residence coalesced so as to render her irremoveable under statute 9 & 10 Vict. c. 66, s. 1. In *Reg.* v. *St. George's-in-the-East* (5) a woman was held to be irremoveable under that Act and the Union Chargeability Act, 1865, by reason of her continuous residence, first as a feme sole and afterwards as a married woman, in a parish for one year. *Reg.* v. *Glossop* (4) is cited as an authority by Blackburn, J., in his judgment in *Reg.* v. *St. George's-in-the-East.* (5)

It is not contended on behalf of the respondents that the pauper acquired any available right under s. 35.

POLLOCK, B. I am of opinion that the order appealed from should be confirmed. We have to say whether the pauper is, within the meaning of s. 34 of the Divided Parishes Act, 1876, "a person who has resided for the term of three years" in the

(1) 11 Q. B. D. 314.
(2) 15 Q. B. D. 339.
(3) 17 Q. B. D. 817.
(4) 12 Q. B. 117.
(5) Law Rep. 5 Q. B. 364.

1887

GUARDIANS OF MEDWAY UNION v. GUARDIANS OF BEDMINSTER UNION.

Pollock, B.

parish of Gillingham in the appellant union "in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render her irremoveable." If she has resided for three years in the appellant union under these conditions of irremoveability, she has gained a settlement in the appellant union. The statutes in question are statute 9 & 10 Vict. c. 66, s. 1, a statute amending the law relating to the removal of paupers, and the Union Chargeability Act, 1865, s. 8. The joint effect of these statutes is as follows. No person is liable after a year's unbroken residence in a parish to be removed therefrom as a pauper. The year is to be computed from the application for the warrant of removal, and no period is to be computed as part of the year during which the pauper has been in receipt of parochial relief, or has come under any of certain other exceptions which are stated in statute 9 & 10 Vict. c. 66, s. 1. Here it is not denied that the pauper did reside in the appellant union for each of the three years necessary for gaining a settlement under s. 34 of the Divided Parishes Act, 1876, "in such manner as would, in accordance with" statute 9 & 10 Vict. c. 66, s. 1, and the Union Chargeability Act, 1865, s. 8, "render her irremoveable." She in fact resided for three years. There was not in any of the three years any legal break in her residence. None of the exceptions come into operation to prevent the time running in her favour. Sect. 34 of the Divided Parishes Act, 1876, takes no account of different kinds of irremoveability. It says nothing as to the suggested distinction between personal and vicarious residence. It does not say "irremoveable in his or her own right," but merely "irremoveable." As events would have it, the pauper has been "irremoveable" as a wife for two years and nine months, and "irremoveable" as a widow for upwards of three months; but she has in fact resided in a parish in the appellant union in an irremoveable condition for three years. And, having done so, she has, in my opinion, acquired a settlement by residence in the appellant union.

The cases of *Reg.* v. *Glossop* (1) and *Reg.* v. *St. George's-in-the-East* (2) were, it is true, decided before the passing of the Divided Parishes Act, 1876; but they are decisions on the parts of the

(1) 12 Q. B. 117. (2) Law Rep. 5 Q. B. 364.

1887

GUARDIANS OF MEDWAY UNION v. GUARDIANS OF BEDMINSTER UNION.

Pollock, B.

previous Acts which are incorporated with the 34th section of that Act, and they constitute a clear authority for the proposition that periods of residence passed by a woman in a parish partly in a single, partly in a married condition may be joined together for the purpose of creating a status of irremoveability. The status of irremoveability thus created gives rise, when it has endured long enough, to a settlement by residence. For the purposes of this appeal it is not necessary to reconcile the 35th with the 34th section of the Divided Parishes Act, 1876.

HAWKINS, J. I also think that the order appealed from should be confirmed. It is an order which adjudges that the settlement of the pauper is in the appellant union. The correctness of this order depends on whether, when it was made, the pauper had acquired by residence a settlement in the appellant union under s. 34 of the Divided Parishes Act, 1876. Under this section a person acquires a settlement by residence for three years in a condition of irremoveability as defined by 9 & 10 Vict. c. 66, s. 1, and the Union Chargeability Act, 1865, s. 8. In this case, no doubt, as long as the marriage continued, either the irremoveability of the wife was the irremoveability of the husband, or, if she could acquire irremoveability on her own account, such irremoveability could always be interfered with by her husband's conduct. Whether personal to herself or derived from him it was always liable to be interrupted by his becoming chargeable to the parish or otherwise forfeiting his own irremoveability. But nothing of the kind occurred, and she continued irremoveable, whether in her own or in her husband's right does not appear to me to matter, for two years and nine months. After this it is admitted that she resided in a condition of irremoveability on her own account for three months. I think that no authority is necessary to shew that these periods of residence can be combined, but, if authority be necessary, it is supplied by *Reg.* v. *Glossop.* (1)

Order of Sessions confirmed.

Solicitors for the appellants: *Prall & Son, Rochester.*
Solicitors for the respondents: *O'Donoghue & Anson, Bristol.*

H. D. W.

(1) 12 Q. B. 117.

1887

Nov. 19, 21.

WHITELEY *v.* BARLEY.

Local Government Acts—Officer of Local Authority "concerned or interested in any bargain or contract" with Local Authority—"Allowances" in addition to Salary—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 189, 193, 326.

By the terms of contracts entered into with a local authority for the purposes of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the surveyor to the local authority was to receive from the contractors, in respect of bills of quantities to be prepared by him, percentages on the amounts which he should certify to be due to such contractors respectively by the local authority:—

Held, by Mathew, J., that in respect of each contract the surveyor was liable to a penalty as having been "concerned or interested" therein within the meaning of s. 193 of the Public Health Act, 1875.

A local authority employed their surveyor, apart from his ordinary duties, to superintend the construction of certain drainage works as their engineer, and agreed to remunerate him by a percentage on the outlay:—

Held, by Mathew, J., that the surveyor was liable to the penalty imposed by s. 193 of the Public Health Act, 1875.

FURTHER CONSIDERATION before Mathew, J.

The action was brought to recover penalties under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 193. It appeared that the defendant was employed as town surveyor by the corporation of Ramsgate, the local authority for the borough within the meaning of the Public Health Act, 1875. His appointment had been made in 1880 by the Ramsgate Improvement Commissioners, the former local authority under the Act, at a salary of 200*l.* a year, which was subsequently increased to 300*l.* a year, and he was allowed besides an office, assistants, fuel, and the privilege of taking pupils. By the bye-laws made by the commissioners under the Act the defendant was "to devote the whole of his time to the duties of his office," and was "to prepare the necessary plans and specifications of all works contracted to be done," and was "to take care that all such works were duly executed." He was also to be "responsible for the condition of the streets, both as regards repair and cleanliness, and was to see that the gully holes, drains, and sewers were kept in an efficient state." On the incorporation of the borough of Ramsgate in 1884 the defendant was re-appointed town surveyor by the corporation.

1887

WHITELEY v. BARLEY.

The plaintiff claimed from the defendant under s. 193 of the Public Health Act, 1875, ten penalties of 50*l.*, (1) three in respect of contracts entered into in 1884 and 1885 by the corporation for the sewering and paving of new streets; (2) seven in respect of contracts entered into in 1885 and 1886 by the corporation for the purposes of a scheme of drainage for Ramsgate. The sewering and paving contracts provided in each that the defendant should prepare bills of quantities, and that for this the contractors should pay him 2½ per cent. on the amount payable under the contract, which amount he was to certify. The drainage scheme was prepared by the defendant as surveyor to the corporation, and received the sanction of the Local Government Board. Upon this the corporation passed a resolution appointing the defendant their engineer for the purposes of the drainage scheme, on the terms as to payment that he was to receive commissions on the price of the works which were not to exceed 780*l.* The plaintiff alleged that two contracts between the corporation and the defendant were contemplated in this resolution, and claimed a penalty in respect of each contract. The corporation entered into five contracts respecting the drainage works, involving in all an expenditure of about 20,000*l.*, which sum was raised by loan. In each of these five contracts there was a provision for the payment by the contractor to the defendant as surveyor, in respect of bills of quantities, of 1½ per cent. on the amount payable by the corporation to the contractor, calculated in the same way as the 2½ per cent. in the sewering and paving contracts. In respect of each of such five contracts the plaintiff claimed a penalty.

The defendant admitted that the contracts in question had been made by the local authority, but denied that such contracts contained any terms rendering him liable to penalties. As regards some of the drainage contracts, a question, the nature of which appears from the judgment, was left to the jury. It was not disputed that the action had been brought within a year of the alleged offences, if any, so as to satisfy 31 Eliz. s. 5, c. 5.

Kemp, Q.C., and *Dickens*, for plaintiff. By s. 326 of the Public Health Act, 1875, the bye-laws of the Improvement Commis-

1887

WHITELEY v. BARLEY.

sioners are continued. They define the duties of the defendant, and shew that as surveyor the planning and superintending of paving and sewering works are included in them. If so, under ss. 189 and 193 (1), he could not have any interest in the works undertaken beyond the amount of his salary.

The bye-laws, and also s. 150 of the Act, shew that "taking out the quantities" is part of the ordinary duties of the defendant as surveyor. Either, then, the percentages are "fees exacted" from the contractors, or the defendant was "concerned or interested" in contracts made by the local authority. In all these cases, as the amount payable to the defendant would be greater or less according to the amount payable by the local authority to the contractor, the defendant had a personal interest in recommending the local authority to accept the higher tenders and in granting certificates of completion for large amounts: *Burgess* v. *Clark* (2); *Towsey* v. *White*. (3) As to the appointment by the corporation of the defendant, their surveyor, to act as their engineer, under the Act, the surveyor to the local authority cannot contract with the local authority. *Melliss* v. *Shirley Local Board* (4) shews that the defendant's appointment was illegal, and gave him no right of action against the corporation.

Finlay, *Q.C.*, and *Tindal Atkinson*, (*Crispe*, with them), for the defendant.

The sums in question are all "allowances" for extra work by

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 189 (which relates to the appointment of officers and servants), "Subject, in the case of officers any portion of whose salaries is paid out of moneys voted by Parliament, to the powers of the Local Government Board, under this Act, the urban authority may pay to the officers and servants so appointed or employed such reasonable salaries, wages, or allowances as the urban authority may think proper."

By s. 193: "Officers or servants appointed or employed under this Act by the local authority, shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act. If any such officer or servant is so concerned or interested, or, under colour of his office or employment, exacts, or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of 50*l*., which may be recovered by any person, with full costs of suit, by action of debt."

(2) 14 Q. B. D. 735.

(3) 5 B. & C. 125.

(4) 16 Q. B. D. 446.

the defendant beyond his ordinary duties as surveyor, properly made by the local authority under s. 189.

As to the 2½ and 1½ percentages for "taking out the quantities." Ordinarily the contractor who tenders for the works employs a quantity surveyor and includes the quantity surveyor's fee in the amount of the tender. Here the corporation preferred that their surveyor should make the calculations. To do so, however, was not, according to the bye-laws, or in any business sense, a part of the defendant's ordinary duties as surveyor. Such work was connected with such duties, but it was extra work which the corporation could not expect the defendant to undertake without some extra remuneration. The mode of payment was in their discretion. With regard to the drainage scheme, it was an undertaking for which competent superintendence was necessary, and had the corporation not employed the defendant, they must have engaged an engineer. The duties incident to the superintendence of the scheme, though connected with those of the defendant as surveyor, were not within the scope of his ordinary employment. The corporation was therefore justified in making the defendant an "allowance." Had this been done by a grant of a lump sum of 780*l.*, the propriety of the proceeding could not have been disputed. It makes no difference that the "allowance" was made by way of percentages on the sums paid for the works. The plan adopted was also advantageous to the ratepayers, for the percentages were payable out of the sums raised by loan, whereas a sum granted as additional salary to an officer must have been paid out of the next rate levied. *Burgess* v. *Clark* (1) and *Melliss* v. *Shirley Local Board* (2) are distinguishable. *Burgess* v. *Clark* (1) was a case of a lease of a room to a local authority by a servant. This was an independent contract, and the rent could not be regarded as an "allowance" for extra work. In *Melliss* v. *Shirley Local Board* (2) the sum in dispute was claimed under a contract with a firm of which the surveyor to the local authority was a member, so that it clearly was not an "allowance" to the surveyor individually.

Kemp, Q.C., in reply.

(1) 14 Q. B. D. 735. (2) 16 Q. B. D. 446.

1887

WHITELEY v. BARLEY.

MATHEW, J. This action was brought to recover penalties alleged to have been incurred by the defendant under s. 193 of the Public Health Act, 1875.

The defendant is town surveyor of the corporation of Ramsgate, and it was not disputed that he was an officer employed by the corporation as the local authority within the description in the section.

It appeared that under three contracts with builders made by the corporation for the purposes of the Act the defendant had been employed to take out the quantities. For this service it was provided in each contract that he should be paid 2½ per cent. on the amount of the contract. This amount the contractor was to receive upon obtaining the defendant's certificate that the works had been completed to his satisfaction.

The first question was whether the defendant was "concerned or interested" in these contracts within the meaning of the section. I am of opinion that he was, and that he has incurred the penalty sought to be recovered in respect of each of these contracts. The object of the statute is to prevent an officer of the local authority from being placed in a position where his duties to his employers conflict with his personal interests. With respect to each contract the defendant had a duty to the corporation, first, to advise as to the estimate of quantities and the amount to be paid to each contractor, and secondly, to decide that the work for which he was to certify had been properly executed. In the performance of this duty he was exposed to the temptation from which the statute was intended to protect him.

The plaintiff further sought to recover seven penalties in respect of contracts entered into by the corporation for the construction of extensive sewage works at Ramsgate. The defendant had prepared a scheme for carrying out a system of main drainage in the town which had been approved by the Local Government Board. The corporation had appointed the defendant their engineer to superintend the execution of the necessary works. By special resolution of the corporation the defendant was to be paid for his services percentages on the sums to be paid for the works which were not to exceed 780*l*. He was also to receive, as in the

case of the other contracts referred to, a commission of 1½ per cent. for taking out the quantities.

An attempt was made at the trial to shew that the whole payment to the defendant was an "allowance" which under the Act the corporation was empowered to make him, and with that view it was sought to establish that the arrangement made as to the 1½ per cent. was that the defendant was to account to the corporation for the amounts received by him less his expenses out of pocket. The jury were not satisfied that there had been any such contract. I have no doubt that the jury were right in this conclusion, and that the respectable witnesses who were called for the defendant had persuaded themselves that the resolution of the corporation entitled the defendant to no more than 780*l.*, and fell into the mistake of supposing that their view of the contract had been the subject of an express bargain.

I cannot doubt that in respect of this employment of the defendant by the local authority he has incurred a further penalty. The cases of *Burgess* v. *Clark* (1), *Todd* v. *Robinson* (2), and *Melliss* v. *Shirley Local Board* (3) seem to me decisive of the question.

It was contended by the counsel for the plaintiff that in respect of the sewage works the defendant had incurred not one but seven different penalties, and to this end it was pointed out that two different percentages were payable under the resolution appointing the defendant as engineer, and that there had been five agreements for the execution of the works entered into by different contractors, in each of which had been inserted the provision that 1½ per cent. should be paid to the defendant for taking out the quantities. I am of opinion that the evidence shewed there was one contract only with the defendant in respect of the sewage works, and that the corporation intended that he should have for his services as engineer the percentages mentioned in the resolution and also those provided for by the contracts.

I regret the conclusion to which I have been compelled to come, and I think it right to add that there was no evidence and no suggestion at the trial that the defendant had been guilty of discreditable or dishonourable conduct in his office of town

(1) 14 Q. B. D. 735. (2) 14 Q. B. D. 739.
(3) 16 Q. B. D. 446.

1887

WHITELEY v. BARLEY.

Mathew, J.

surveyor. With respect to the main drainage scheme he received a moderate recompense for very valuable work, and I see no reason to doubt that he had served the corporation of Ramsgate with equal integrity and ability. The defendant would seem to be the victim of a law which in his case operates harshly. The motives for bringing this action were not disclosed at the trial, and I am not concerned in making them the subject of inquiry or comment.

Judgment accordingly.

Solicitors for plaintiff: *Kingsford, Dorman, & Co., for Hills, Margate.*

Solicitors for defendant: *Meredith, Roberts, & Mills, for Hubbard, Ramsgate.*

H. D. W.

Dec. 19.

COLLIS *v.* LEWIS. CLARIDGE, CLAIMANT.

County Court—Appeal—Interpleader—"Action"—Amount not exceeding 20*l.* *—Leave to appeal—*19 *&* 20 *Vict. c.* 108, *s.* 68—30 *&* 31 *Vict. c.* 142, *s.* 13.

An appeal does not lie, even by leave of the judge, from the decision of a county court in proceedings in interpleader, where neither the money claimed, nor the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.*

APPEAL by the claimant in interpleader proceedings from the decision of the judge of the Clerkenwell County Court.

The amount in dispute was not sufficient to bring the case within the terms of s. 68 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), by which "an appeal from the decision of a county court . . . shall be allowed . . . in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, exceeds twenty pounds."

The judge of the county court gave leave to appeal from his decision under s. 13 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), by which, "with the leave of the judge an appeal shall be allowed in actions in which an appeal is not now allowed, if the judge shall think it reasonable and proper that such appeal should be allowed."

Haldinstein, (*E. Bray*, with him), for the execution creditor, took a preliminary objection to the hearing of the appeal.

1887

COLLIS v. LEWIS.

The judge in giving leave to appeal purported to act under s. 13 of the County Courts Act, 1867, but that section only gives an appeal by leave in "actions," and interpleader is not an "action" within the meaning of the definition given by Order LII. of the County Court Rules, 1886, which is: "Every proceeding commenced by plaint in a county court." Interpleader is a "matter," which is defined by the same rule as "every proceeding commenced otherwise than by plaint." The judge therefore had no power to give leave to appeal.

Beaumont Morice, for the appellant.

[The following decisions were referred to: *Beswick* v. *Boffey* (1); *Vallance* v. *Nash* (2); *Mason* v. *Wirral Highway Board* (3); *Hamlyn* v. *Betteley* (4); *Robinson* v. *Tucker* (5); *Dawson* v. *Fox*. (6)

PER CURIAM (Wills and Grantham, JJ.). The provision in s. 13 of the County Courts Act, 1867 (30 & 31 Vict. c. 142) that "with the leave of the judge an appeal shall be allowed in actions in which an appeal is not now allowed," does not apply to interpleader proceedings; when the Act of 30 & 31 Vict. c. 142, was passed, there were already Acts relating to the county courts in the phraseology of which a distinction is maintained between actions properly so called and interpleader proceedings. The latter are never spoken of as actions. It is therefore not reasonable to suppose that in an Act dealing with the county courts the distinction was abandoned, and interpleader proceedings intended to be included in the term "actions." As, therefore, the amount in question does not exceed 20*l*., the amount fixed by s. 68 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), which gives a right of appeal in interpleader proceedings, no appeal lies, even by leave.

Appeal dismissed.

Solicitor for appellant: *J. E. Coxwell.*

Solicitors for respondent: *W. J. Child & Son.*

(1) 9 Ex. 315; 23 L. J. (Ex.) 89.
(2) 2 H. & N. 712; 27 L. J. (Ex.) 142.
(3) 4 Q. B. D. 459.
(4) 6 Q. B. D. 63.
(5) 14 Q. B. D. 371.
(6) 14 Q. B. D. 377.

P. B. H.

1887
Dec. 7.

[IN THE COURT OF APPEAL.]

IN RE NEWBOULD (A SOLICITOR).

Solicitor and Client—Costs—Taxation—Remuneration for conducting Sale by Auction when Auctioneer paid by Client — Scale Fees—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*Gen. Ord., August*, 1882, 2, *Sched. I., Part I.*

A solicitor employed by the vendor to conduct business connected with a sale of freehold property by public auction is, where the sale is completed, only entitled to charge the scale fees prescribed by the General Order of August, 1882 (Sched. I., Part I.), made under the Solicitors' Remuneration Act, 1881. Where, therefore, the auctioneer's commission is paid by the client so that the scale of fees for "conducting the sale" does not, by r. 11 of Sched. I., Part I., apply, the solicitor is not entitled to charge the client anything for work done in respect of conducting the sale.

In re Faulkner (36 Ch. D. 566) overruled.

APPEAL from a decision of the Queen's Bench Division.

The appellant, a solicitor, was employed by the respondent to conduct the business of a sale by auction of freehold property belonging to the respondent.

The auctioneer was employed, and his commission was paid, by the respondent. The sale was effected, and the appellant delivered to the respondent his bill of costs, in which were included charges for attending the sale, and for other work done in respect of the conduct thereof.

By Gen. Ord. 2, of August, 1882, made under the Solicitors' Remuneration Act, 1881, "the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing . . . . is to be regulated as follows, namely:

"(*a.*) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in Part I. of Sched. I. to this order, and to be subject to the regulations therein contained.

"(*b.*) In respect of leases, and agreements for leases, of the kinds mentioned in Part II. of Sched. I. to this order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the

solicitor having the conduct of the business is to be that prescribed in Part II. of such Sched. I."

"6. In all cases to which the scales prescribed in Sched. I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand communicated to the client, elect that his remuneration shall be according to the present system as altered by Sched. II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this order."

Sched. I., Part I., prescribes a scale of charges to be made by the vendor's solicitor for conducting a sale of property by public auction, including the conditions of sale, and also prescribes a scale of charges to be made by the vendor's solicitor for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or condition of sale, if any).

By rule 11 of Sched. I., Part I., "The scale for conducting a sale by auction shall apply only to cases where no commission is paid by the client to an auctioneer."

Upon taxation of the appellant's bill of costs as between solicitor and client, the master disallowed the appellant's charges for attending the sale, and conducting the business thereof, but allowed the scale fees for deducing title and perusing and completing conveyance.

The appellant had given no notice to the respondent under rule 6 of the General Order that he elected not to be bound by the scale fees.

On appeal from the master's taxation to the Queen's Bench Division the Court (Stephen and Charles, JJ.), refused to order a review of the taxation.

The solicitor appealed.

Bowen Rowlands, Q.C. (*F. C. Phillips*, with him), for the appellant. The appellant having been retained by the respondent to conduct the business of the sale by auction, is entitled to be paid for that work in addition to the scale fees for deducing title, though he cannot charge the scale fees for conducting the sale, because the auctioneer's commission was paid by the respondent.

1887

IN RE NEWBOULD.

In re Field (1) decided that a solicitor who had transacted business connected with a lease could only charge according to the scale in Part II. of Sched. I., but the same rule does not apply when the business is transacted in connection with sales of freehold: *In re Faulkner.* (2) In that case *In re Field* (1) was cited, but North, J., held that the solicitor was entitled to his proper charges in respect of any work for which the auctioneer had not been paid, and which would have been included in the "conducting fee," if the auctioneer's commission had not been paid by the client.

Cock, Q.C., and *Cyril Dodd*, for the respondent. It was intended by the Act and General Order that in all cases in which the auctioneer's charges were not charged by the solicitor against the client, the solicitor should not be entitled to charge for conducting the business of a sale by auction of freehold property, though by Gen. Ord. 4, he may recover certain expenses out of pocket, which do not include the auctioneer's commission.

By Gen. Ord. 6 the solicitor may protect himself by making a special bargain with the client electing not to be bound by the scale. The decisions in *In re Field* (1) and *In re Emmanuel and Simmonds* (3) in effect establish that, in the absence of any such bargain, the solicitor is only entitled to remuneration according to the scale in respect of conducting any business "connected with" sales or leases. The decision in *In re Faulkner* (2) is contrary to the authority of those cases, and no reason is given in the judgment which justifies the distinction drawn between sales of freehold property and leases.

Bowen Rowlands, Q.C., replied.

LORD ESHER, M.R. In this case the solicitor was employed in respect of a sale by auction of freehold property belonging to the client. That sale was effected, and the solicitor claims to be paid in respect of his employment with regard to it. By Gen. Ord. 2, "The remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing is to be regulated as follows,

(1) 29 Ch. D. 608. (2) 36 Ch. D. 566.
(3) 33 Ch. D. 40.

namely, (*a*), in respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business" (and "the conduct of the business," means, I think, the conduct of the sale) "is to be that prescribed in Part I. Sched I., to this order, and to be subject to the regulations therein contained;" and "(*b*). The remuneration of a solicitor in respect of leases and agreements for leases is to be that prescribed in Part II. of Sched. I. In the case of *In re Field* (1) the Court of Appeal held that a solicitor, who had conducted business connected with a lease, was entitled to be remunerated only according to the scale in Part II. of Sched. I. The decision was that the solicitor must be paid according to the scale in the schedule and not otherwise, because, said the Court, with respect to executed business, the order provides for the solicitor's remuneration, not only for conducting business which may be strictly called the business of the lease, but in respect of business "connected with" leases. That part of the decision was challenged by counsel for the appellants; in arguing the case of *In re Emanuel and Simmonds* (2), Mr. Charles said: "Mr. Justice Pearson seems to have read *In re Field* (1) as deciding that all business connected with a lease comes within the scale fee, but the case does not decide that. Where could such a rule stop?" The answer of the Court of Appeal was that *In re Field* (1) decided that, having regard to Gen. Ord. 2, the remuneration for the negotiations for a lease, where the transaction was completed, must be held to be included in the payment to be made on the ad valorem scale for the lease. Cotton, L.J., went on to say: "To my mind the only question we have here is this, whether in this particular case it can be said that this agreement, or anything in it, is anything but business connected with the lease. . . . . In the present case the agreement is, in my judgment, merely part of the negotiation for a lease which was afterwards granted, and, the transaction being complete, one charge must, in my opinion, cover all charges with reference to this agreement, as well as everything else connected with the granting of the lease, or the negotiations for the lease." Now, if the same rule applies to sales, the only question we have to ask ourselves in this case is whether the

(1) 29 Ch. D. 608. (2) 33 Ch. D. 40.

1887

IN RE NEWBOULD.

Lord Esher, M.R.

business conducted by the solicitor was business connected with the sale. It is said that some distinction should be made between sales and leases, but if the decision in *In re Emanuel and Simmonds* (1), with regard to the remuneration in respect of leases under Gen. Ord. 2 (*b*), was founded upon the first clause of Gen. Ord. 2, it is impossible, to my mind, to say that the interpretation of the Court does not equally apply to sales, the remuneration in respect of which is dealt with under (*a*). Sales and leases are placed together in the first clause of Gen. Ord. 2. It is impossible, I think, to say, after the decisions I have referred to, that though the remuneration of a solicitor for conducting business connected with a lease can only be under the scale fees, the same rule does not apply to his remuneration for conducting business connected with sales. If so, it follows that we have only to see whether the items in the solicitor's bill for work done at the auction are items charged for business connected with the sale. If they are, he is only entitled to be paid according to the scale fees. That result is no doubt directly contrary to North, J.'s decision in *In re Faulkner* (2), but that decision is contrary to the ruling of the Court of Appeal in *In re Field* (3) and *In re Emanuel and Simmonds.* (1) I am of opinion that it is impossible to see any ground for making a distinction between sales and leases, having regard to the terms of the first clause of Gen. Ord. 2, in which the same words—"business connected with"—are applied to both. It cannot be doubted that the business in question here was business connected with the sale. The solicitor, therefore, is only entitled to be paid according to the scale in Sched. I., Part I. If he can bring himself within any part of that scale he is entitled to fees according to that scale. If he cannot, he is not entitled to be paid anything. Here the charges in question are not brought within the scale, and he is therefore not entitled to be paid anything. I think he would be entitled to the scale fees for conducting the sale as well as for deducing title, if he could have brought himself within that part of the scale which deals with conducting the sale, but he has not brought himself within that part of the scale, because by r. 11 of Sched. I.,

(1) 33 Ch. D. 40. (2) 36 Ch. D. 566.

(3) 29 Ch. D. 608.

1887

IN RE NEWBOULD.

Part I., the scale for conducting a sale by public auction does not apply where the client pays the auctioneer's commission.

We must therefore say that the decision of the Queen's Bench Division was right, and that we disagree with the decision in the case of *In re Faulkner*. (1)

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitor for appellant: *W. Newbould.*

Solicitors for respondent: *S. Learoyd & James.*

W. A.

[IN THE COURT OF APPEAL.]

Oct. 28; *Dec.* 14, 19.

UNDERHAY *v.* READ.

Landlord and Tenant—Mortgage—Subsequent Lease by Mortgagor—Notice to pay Rent to Mortgagee—Possession of Tenant after Notice—Tenancy to Mortgagee — Money paid by Compulsion of Law—Rent paid to Mortgagee money paid for Landlord.

A mortgagor let the mortgaged premises subsequently to the mortgage. During the quarter ending at Michaelmas the mortgagees gave a notice to the tenant informing him of the existence of the mortgage, and that the principal sum was still due and owing together with an arrear of interest, and requiring him to pay the rent thereafter to accrue due to them. The rent which became due at Michaelmas being still unpaid, an order was made in an action against the mortgagor appointing the plaintiff, who had recovered judgment, receiver of the rents of the premises, "without prejudice to the rights of any prior incumbrancers who may think proper to take possession of the same by virtue of their respective securities." Subsequently the mortgagees threatened the tenant with legal proceedings unless he paid the rent to them, and the tenant thereupon paid them the quarter's rent due at Michaelmas. The receiver claimed payment of such rent from the tenant:—

Held, by the Queen's Bench Division, that the tenant's occupation after notice to pay rent to the mortgagees was evidence from which a tenancy to the mortgagees ought to be inferred, and therefore he was justified in paying the rent to them, and could not be liable for the same rent to the mortgagor or any one claiming under him:—

Held, on appeal by the Court of Appeal, that the tenant had not been guilty of any disobedience of the receivership order in paying rent to the mortgagees, they being prior incumbrancers whose rights were reserved by the order; that the tenant, having paid the rent to the mortgagees under compulsion of law and in consequence of his lessor's default, could set up such payment in answer to the claim for the rent by the receiver, who claimed through his lessor; and that consequently the claim of the receiver could not be maintained.

Johnson v. *Jones* (9 A. & E. 809) approved and followed.

APPEAL by Arthur Butler from an order made by Pollock, B.,

(1) 36 Ch. D. 566.

1887

UNDERHAY v. READ.

at chambers, in the action of *Underhay* v. *Read*, directing that he should pay to the plaintiff, who, having obtained judgment, had been appointed receiver in the action, the sum of 18*l.* 7*s.* 6*d.*, due from him for arrears of rent of his dwelling-house from June 24 to September 29, 1886.

On February 8, 1886, Read, the defendant in the action, mortgaged the house in question to Messrs. Miles & Preston. The mortgage deed contained a clause which brought it within sub-s. 13 of s. 18 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), and excluded the power to lease given to mortgagors by sub-s. 1.

By an agreement dated March 11, 1886, Read let the house to Butler, the tenant, for three years from March 25, 1886, at a yearly rent of 70*l.* for the first year, and 73*l.* 10*s.* subsequently, payable quarterly.

On June 29, 1886, the tenant paid the first quarter's rent to Read's agent.

On July 7, 1886, the tenant received from Miles & Preston, the mortgagees, a notice, which informed him of the existence of the mortgage of February 8, 1886, and that the principal sum was still due and owing together with an arrear of interest, and proceeded as follows: "We therefore require you to pay to us the rent now and hereafter to accrue due in respect of the said premises, and on no account after the date hereof to pay any rent in respect of the said premises to the said George Read, or to any person or persons other than one of us or our agent."

By a notice dated December 9, 1886, the tenant was informed that the mortgage had been transferred to the Poole, Baltic and Quebec Timber Company, and was requested to pay them the rent due, and by a letter of December 10, the mortgagees informed him of the transfer, stating that he would be safe in paying his rent to the transferees.

On December 13, 1886, an order was made by Field, J., at chambers, in the action of *Underhay* v. *Read*, of which the following parts are material: "It is ordered that the plaintiff be appointed receiver without security to receive the rents and profits of two houses , . . one of which is let to Mr. Butler . . . which it appears from the said affidavit are owned by the defen-

dant. But this appointment to be without prejudice to the rights of any prior incumbrancers upon the said premises, who may think proper to take possession of the same by virtue of their respective securities, or if any prior incumbrancer is in possession, then without prejudice to such possession. And that the tenants of the said premises do attorn and pay their rents in arrear and growing rents to such receiver."

On December 14, 1886, this order was served on the tenant.

On January 25, 1887, the transferees of the mortgage threatened the tenant with legal proceedings unless he paid them the rent then due.

On January 26, 1887, the tenant paid to the transferees the rent for the two quarters from Midsummer to Christmas, 1886.

On July 26, 1887, the order now appealed from was made.

Gore, for the tenant. The order directing payment to the receiver is wrong. The quarter's rent in question formed part of the rent which the tenant paid to the transferees of the mortgage. They were entitled to receive this rent, and therefore the tenant is not bound to pay it over again to the receiver. The notice given by the mortgagees requiring payment of the rent to them, together with the subsequent payment in pursuance of such notice, establish a tenancy to the mortgagees, which would be a tenancy from year to year, according to the terms of the demise, so far as applicable: *Corbett* v. *Plowden* (1). This contention is supported by the cases collected in the note to *Moss* v. *Gallimore*. (2) *Evans* v. *Elliot* (3) can only be relied upon as an authority for the proposition that notice alone is insufficient to create a tenancy to the mortgagee. That case is therefore distinguishable from the present, and so is *Hickman* v. *Machin* (4), where there had been no payment. *Waddilove* v. *Barnett* (5) goes further than is necessary for the present tenant's contention, and supports the view that notice alone is sufficient. Here the payment of the rent under pressure is an answer to any claim on the part of the mortgagor or his receiver.

(1) 25 Ch. D. 678.
(2) 1 Sm. L. C. 612–615, 9th ed.
(3) 9 A. & E. 342.
(4) 4 H. & N. 716.
(5) 2 Bing. N. C. 538.

1887

UNDERHAY v. READ.

Arthur Powell, for the receiver. The case of *Waddilove* v. *Barnett* (1) cannot be supported, for it is clear that notice alone cannot create a tenancy, but there must be an attornment on the part of the tenant: *Wilton* v. *Dunn* (2); *Ward* v. *Carttar*. (3) In *Evans* v. *Elliot* (4) Lord Denman said: "The tenant's attornment is at least necessary to create this relation; and we are all clearly of opinion that the subsequent attornment which was proved in this case cannot have the effect of setting up the mortgagee's title by relation from the period when notice was given." So here the payment in January cannot relate back to the notice given in the previous July. The receiver takes priority in respect of the rent which was due when notice of his appointment as receiver was given to the tenant. It is true that the order appointing the receiver was made without prejudice to the title of prior incumbrancers, who might take possession, but the mortgagees did not take possession, and, therefore, the order binds the rent in the hands of the tenant, and is equivalent to an attachment of the rent: *In re Pope*. (5)

[MANISTY, J., referred to *Brown* v. *Storey*. (6)]

The notice given by the original mortgagees cannot support the title of the transferees of the mortgage.

[MANISTY, J. What jurisdiction is there to make such an order as this on a summons at chambers?]

The receiver is an officer of the Court, and there is power in the Court to deal with his rights and liabilities. The tenant never took the objection, or asked to have any question as to his liability tried.

Gore replied.

MANISTY, J. This is an application by way of appeal against an order of Pollock, B., directing that a quarter's rent of a house should be paid by the tenant to the plaintiff as receiver. The ground of appeal is that the appellant was tenant to the mortgagees, and not to the original lessor. The mortgage was executed in February, 1886, and on March 11, 1886, the mortgagor demised the premises to the present appellant at a yearly rent payable

(1) 2 Bing. N. C. 538.
(2) 17 Q. B. 294.
(3) Law Rep. 1 Eq. 29; 35 Beav. 171.
(4) 9 A. & E. at p. 354.
(5) 17 Q. B. D. 743.
(6) 1 M. & G. 117.

quarterly. An action was brought by Underhay against Read, the mortgagor, and the plaintiff in that action was appointed receiver in December, 1886. The question to be determined is whether, where the receiver was appointed in December, the tenant had a right, after notice of such appointment, to pay the rent, which became due on the previous Michaelmas day, to the mortgagees. On July 7, 1886, notice had been given by the mortgagees to the tenant to pay the rent to them from that time, and not to pay it to the lessor or to any other person. On September 29 a quarter's rent became due, but neither party then demanded it, and Butler, the tenant, continued in possession. On December 10 he received notice of the transfer of the mortgage, but that circumstance, I think, has no material bearing on the question, for the transferees would stand in the same position as the original mortgagees. Then on December 13 an order was made appointing the plaintiff receiver of the rents of the defendant's houses, one of which was the house occupied by the appellant. The question comes back to this, whether the mortgagees had a right after the notice of July 7 to require payment of the rent to them. The present case differs somewhat from all the other cases which have been referred to, but the question on which it depends is, what is the right inference to draw? Is it that Mr. Butler assented to become tenant to the mortgagees from year to year, according to the terms of the lease, so far as they were applicable to such a tenancy? That would be a question for a jury, and, in my opinion, the case of *Brown* v. *Storey* (1) is almost conclusive to shew that the proper inference to draw in the present case is that in July Mr. Butler became tenant to the mortgagees. The case of *Evans* v. *Elliot* (2) was cited as an authority for the proposition that notice alone does not make a tenancy, and no doubt there are some passages in the judgments in that case which might support Mr. Powell's argument so far; but that is not this case, for here there was something beyond mere notice. The case of *Brown* v. *Storey* (1) seems to me to decide that it is a question of fact for the jury, in the absence of express assent, and that the circumstance that the tenant continues in possession after the receipt of the notice is evidence from which a jury may and

(1) 1 M. & G. 117. (2) 9 A. & E. 342.

1887

UNDERHAY v. READ.

Manisty, J.

ought to infer a tenancy to the mortgagee. The judge at the trial in that case told the jury that notice alone would create a tenancy, and the Court held that it was no objection to his summing-up that he had omitted to leave the question of assent to them in express terms. In delivering judgment Tindal, C.J., said (1): "I agree that the relation of landlord and tenant cannot be created without the consent of both parties. Here both tenant and landlord agreed that the former should remain in possession for a year. It has been settled, ever since the case of *Keech* v. *Hall* (2), that a mortgagor cannot, without the privity of the mortgagee, create a tenancy, and the mortgagee may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mortgagor granted subsequently to the mortgage. No interest can pass to the tenant, and ejectment may be maintained without notice." Applying this statement to the present case, it must be taken that Mr. Butler knew the law, and therefore he must have known that he could be turned out if he did not comply with the notice, which affords strong evidence that he consented to remain in as tenant to the mortgagees. Tindal, C.J., proceeds as follows: "But from the case referred to, and from many subsequent, it appears that the mortgagee may adopt the act of the mortgagor in granting the lease; or at least he may create a tenancy from year to year according to the terms of the lease. Here the evidence was that after the assignment of the mortgage notice was given by the assignees of the mortgagee to the plaintiff to pay to them the rent then due and thereafter to become due in respect of the premises comprised in the mortgage, which appears to import a consent that he should hold at least for one year. It is said that there was no agreement in fact, and that it was not left to the jury as a matter for their consideration whether they would infer an agreement. The question was not left to the jury in precise terms, but without doubt it would have been so left if the counsel had supposed that the jury would hesitate to draw that inference. The plaintiff's only title to the possession was the lease from the mortgagor. From the parties in whom was the legal interest he receives a notice requiring payment of the rent due and accruing

(1) 1 M. & G. at pp. 126, 127. (2) Dougl. 21; 1 Sm. L. C. 546, 9th ed.

due. If he remained in possession without repudiating the notice, he seems to have been in possession under the old terms." Bosanquet, J., in the same case, expressed himself very strongly to the same effect. He said (1): "It is said that it ought to have been left to them" (the jury) "to say whether the plaintiff assented to a new tenancy. It is clear that there can be no demise without an assent by both parties. . But if it had been wished to raise the point of want of assent, that should have been suggested to the learned judge. If it had been, the jury could have found but one way." I take it that Bosanquet, J., meant that if the jury had found the other way he would have been prepared to set aside the verdict. In the present case I am of opinion that the proper inference is that Mr. Butler became tenant to the mortgagees from year to year, and therefore the order directing him to pay rent to the receiver is wrong, and ought to be set aside.

This renders it unnecessary to decide the other point which I suggested in the course of the argument, namely, whether there is any jurisdiction to make such an order as this upon a summons at chambers.

CHARLES, J. I am of the same opinion. It is a question of fact what was the state of the tenancy, and the conclusion at which I have arrived is that Mr. Butler was tenant to the mortgagees, and not to the mortgagor, and therefore the order directing him to pay rent to the mortgagor's receiver was wrong.

Appeal allowed.

P. B. H.

Against this decision the receiver appealed.

Dec. 14, 19. *A. Powell*, and *Ingpen*, for the receiver. The effect of the receivership order is to direct that the rents shall be paid to the receiver, and payment to any one else without the leave of the Court was a disobedience of the order. It is true that the order reserves the rights of prior incumbrancers who may think proper to take possession. But the mortgagees in this case

(1) 1 M. & G. at p. 128.

1887

UNDERHAY v. READ.

were not in possession. They were not in actual possession nor in constructive possession until the tenant attorned to them, which was not until after this rent became payable to the receiver under the order. The tenant was bound to obey the order of the Court unless the mortgagees were in possession, and, having disobeyed it, is liable and should be ordered to pay this rent over again to the receiver. It is contended that the effect of the reservation in the order is only to preserve the right of prior incumbrancers to apply to the Court to enforce their rights. It does not mean that the tenant who owes rent to the mortgagor is entitled, without the leave of the Court, to pay it to the mortgagees. Assuming that the mortgagees have now by receipt of rent constructively taken possession, they could not by taking possession affect rents already due to the receiver, but only the rents to accrue due. The rent in question was due before there was anything amounting to taking possession by the mortgagees. They cited on this point *Angel* v. *Smith* (1); *Noyes* v. *Pollock* (2); *Hobson* v *Sherwood* (3); Daniel's Chancery Forms, pp. 718, 720; 1 Seton on Decrees, 4th ed., pp. 410–423; *In re Pope* (4). The receiver had under the receivership order as against the tenant at least all the rights of the mortgagor. The mortgagor could have recovered this rent from the tenant at the time it became due, and the subsequent payment to the mortgagees could not divest that right.

Where the mortgage is prior to the lease, there is no privity between the mortgagees and the lessee. The mortgagees are not reversioners, and have no right to the rent under the lease. Until there has been what amounts to an eviction, the tenant must pay rent to his lessor. There was no threat of eviction here till January. The mere notice by the mortgagees to the tenant to pay rent to them is not an eviction: *Evans* v. *Elliott* (5); *Wilton* v. *Dunn.* (6) There must be an attornment by the tenant to the mortgagees in order that there may be a constructive eviction; there was nothing here amounting to an attornment to the mortgagees till the payment of rent to them in January.

(1) 9 Ves. 335.
(2) 32 Ch. D. 53.
(3) 19 Beav. 575.
(4) 17 Q. B. D. 743.
(5) 9 A. & E. at p. 354.
(6) 17 Q. B. 294.

That subsequent attornment cannot relate back so as to constitute an eviction before the rent became due at the previous Michaelmas, and to deprive the mortgagor of his vested right of action for the rent.

[They also cited on this point *Hickman* v. *Machin* (1); *Moss* v. *Gallimore* (2); *Keech* v. *Hall* (3); *Pope* v. *Biggs*. (4)]

The facts in *Johnson* v. *Jones* (5) were very similar to those of the present case, but that decision cannot now be considered good law. The tenant cannot be looked upon as having been compelled by law to pay a sum which the lessor ought to have paid, and therefore as having paid money for his lessor at his request which he can set off against the rent. It is not like the case of a ground rent or rent-charge upon land paid by the tenant for the recovery of which the tenant might be distrained upon, as in the cases of *Sapsford* v. *Fletcher* (6) and *Taylor* v. *Zamira*. (7) Neither as interest in arrear on the mortgage nor as rent could anything be recovered from the tenant by the mortgagees. The payment of the money to them is a mere collateral condition like any other condition which a person with a prior title might impose at his option upon the tenant as a term of his abstaining from the exercise of his power to evict the tenant.

[They also cited *Carpenter* v. *Parker*. (8)]

Gore, for the tenant, was not called upon.

FRY, L.J. This is an appeal from the order of the Divisional Court setting aside the order of a judge at chambers, made under the following circumstances:—The plaintiff having recovered judgment had obtained an order by way of execution appointing him receiver of the rents of two houses, of one of which Butler was tenant; and the order of the judge at chambers now in question directed the tenant to pay over again to the receiver so appointed the amount of the Michaelmas rent which he had already paid to the transferees of the mortgage. I make no observation with regard to the form of the proceeding before the judge at

(1) 4 H. & N. 716; 28 L. J. (Ex.) 310.
(2) 1 Sm. L. C. 604, 9th ed.
(3) 1 Sm. L. C. 546, 9th ed.
(4) 9 B. & C. 245.
(5) 9 A. & E. 809.
(6) 4 T. R. 511.
(7) 6 Taunt. 524.
(8) 27 L. J. (C.P.) 78; 3 C. B. (N. S.) 237.

1887

UNDERHAY v. READ.

Fry, L.J.

chambers, for that has not been discussed. With regard to the question raised before us the facts are as follows:—In February, 1886, the defendant mortgaged the house to Messrs. Miles and Preston. In March he let the house to Butler for a term of three years. The tenant paid his rent to the defendant down to June, 1886. Whilst the next quarter was running, viz., on July 7, the mortgagees gave notice to the tenant requiring him to pay the rent then and thereafter to accrue due to themselves and not to the mortgagor or any other person. On December 9 the tenant received notice of a transfer of the mortgage to the Poole, Baltic and Quebec Timber Company, and was requested to pay them the rent then due, viz., that for the quarter ending at Michaelmas. In a few days afterwards the receivership order was made and served on the tenant. He was thereby placed in a position of some difficulty with regard to the question whom he was to pay, and, no payment of rent being made, in the meantime the Christmas rent became due. On January 25 the tenant received a notice from the transferees of the mortgage threatening him with legal proceedings unless he paid them the rents due at Michaelmas and Christmas, and thereupon he paid them those rents. The receiver then applied at chambers for an order that the tenant should pay the Michaelmas rent over again to him, and the judge at chambers ordered such payment, but the Divisional Court rescinded his order.

The first argument on behalf of the receiver was that the Court having appointed the plaintiff receiver of the rents will not permit any interference with the reception of the rents by him without their leave, and that by not paying the rents to him the tenant had committed what amounted to a contempt, and therefore should be ordered to pay over again. In order to deal with that argument it is necessary to consider the form of the order appointing the receiver. By the order the appointment is to be "without prejudice to the rights of any prior incumbrancers upon the said premises who may think proper to take possession of the same by virtue of their respective securities." It seems to me that the transferees of the mortgage were prior incumbrancers who had thought proper to take possession within the meaning of that provision. They had done all they could

1887

UNDERHAY v. READ.

FRY, L.J.

by way of taking possession by giving notice of the mortgage and claiming to receive the rents from the tenant. I think the form of the order is designed to sanction the payment to such prior incumbrancers of any sums to which they may be entitled without any further application to the Court; and that, whatever their rights may be, they may enforce them without being guilty of a contempt of Court. It is no doubt true that this form of order is of modern invention, but a similar form is by no means modern by which, when it came to the knowledge of the Court of Chancery that the property in respect of which a receiver was to be appointed was subject to a prior mortgage, the Court reserved the rights of the mortgagees. No case can be produced in which a person has ever been committed for enforcing such prior rights. I therefore think that, whatever the rights of the prior incumbrancers were, they were entitled to enforce them, and that the tenant in making a payment to them to which they were entitled would not commit a contempt of the order of the Court.

We have therefore to inquire whether amongst the rights of the prior incumbrancers was that of receiving this sum from the tenant, and whether the tenant was liable to pay it to them in such sort that, if he paid it under compulsion of law, he could set up such payment as an answer to his lessor's claim for rent. If he was justified in making and compelled to make this payment to them by reason of their prior title, then I do not think that either he or they can be compelled to pay to the receiver the amount so paid and received. This point came before the Court in the case of *Johnson* v. *Jones* (1) so long ago as 1839; and it was there held that to an avowry for rent the tenant may plead payment of it to a mortgagee to whom the premises had been mortgaged in fee before the demise to the plaintiff, and who had demanded payment from the plaintiff and threatened to put the law in force in case of refusal. The circumstances of that case were similar to those of the present case; the mortgagee had demanded rent and threatened eviction in case of refusal to pay it. The Court acted on the principle that when a payment was one made under compulsion of law, and in

(1) 9 A. & E. 809.

1887

UNDERHAY v. READ.

FRY, L.J.

consequence of the default of the lessor, the tenant was at liberty to treat the payment which he had been so compelled to make as payment of rent. Denman, C.J., in giving judgment, says: "This is a plea not of nil habuit in tenementis, but of payment; and the defect of the lessor's title is shewn only as a medium of proof that the payment was for the benefit and by reason of the default of the lessor himself." Littledale, J., said: "This is not a plea of nil habuit, nor of eviction; nor is it a voluntary payment to one who claims under a prior title. The plaintiff does not deny that he holds as tenant to the defendant, but he shews that the lease was made subject to a prior charge, viz., the mortgage, which he was compelled to pay." The counsel for the receiver said that that case was wrongly decided, and that there was no compulsion of law to pay the rent in the proper sense of the term; that the mortgagee could at his option, as a condition of his not evicting the tenant, impose what terms he pleased and so could claim payment of a sum of money as such a condition; but the tenant could not be said to be compelled by law to pay the rent in the same sense as in the case of a rent-charge, where there is a legal right to distrain for the rent. I do not think that the distinction so drawn is sound. The interest of the mortgage debt is connected with the land and so the condition imposed by the mortgagee is not a merely collateral matter. The mortgagee is by demanding the rent really only enforcing his right to recover the interest on the mortgage debt charged on the land; and so far as the tenant is concerned the question whether a payment can be enforced by distress or eviction is most immaterial to him. Either may, as it appears to me, be fairly called compulsion of law, and, if the tenant makes under such compulsion payment of a sum which remains due by the default of his lessor, he may set up such payment in answer to a demand for rent. It having been so decided in the case of *Johnson* v. *Jones* (1) as far back as 1839, we should in any case be unwilling to disturb the law as there laid down; but the case has since been referred to and treated as a binding authority in *Boodle* v. *Cambell* (2); and the observations of Bramwell, B., in *Hickman* v. *Machin* (3) are to the same effect as the decision

(1) 9 A. & E. 809. (2) 7 M. & G. 386. (3) 4 H. & N. 716.

in *Johnson* v. *Jones* (1). I think, therefore, that the decision ought to be treated as good law, and that we should follow it.

For these reasons I think that the judgment of the Queen's Bench Division should be affirmed, and this appeal dismissed.

1887

UNDERHAY v. READ.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitor for the receiver: *A. H. Crowther.*

Solicitors for the tenant: *Peacock & Goddard, for Trevanion, Curtis, & Ridley, Bournemouth.*

E. L.

PINE, APPELLANT; BARNES, RESPONDENT.

Dec. 6.

Inn—Lodger, Sale of Intoxicating Liquors to—Consumption by Guests of Lodger during Closure of Licensed Premises—Licensing Act, 1874 (37 & 38 *Vict.* c. 49).

By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 9, "Any person who during the time at which premises for the sale of intoxicating liquors are directed to be closed . . . sells . . . any intoxicating liquor . . . or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises," is liable to a penalty. By s. 10, "nothing in this Act . . . contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to bonâ fide travellers or to persons lodging in his house."

The appellant, a licensed innkeeper, sold and supplied to a bonâ fide lodger in his house intoxicating liquors which were consumed, during the time at which the premises are directed to be closed, in a private room on the premises by the lodger and bonâ fide guests of the lodger after a dinner given by him to them:—

Held, that the appellant was not liable to be convicted under s. 9 of the Act.

CASE stated by justices under 20 & 21 Vict. c. 43.

An information having been preferred by the respondent, a superintendent of police, against the appellant under s. 9 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), for that the appellant, then being a licensed person for the sale of intoxicating liquors by retail in his house and premises, unlawfully allowed intoxicating liquors to be consumed on his said licensed premises during the time that the same were required to be closed by and

(1) 9 A. & E. 809.

1887

PINE v. BARNES.

in pursuance of the Licensing Act, 1874, the justices convicted the appellant, subject to the following case:—

On July 4, 1887, at about 10.25 in the evening, C. Le May and several persons were found by the police drinking intoxicating liquors in a room in the "Greyhound," a fully licensed house kept by the appellant, after 10 o'clock, the hour at which the said house was directed to be closed by the Licensing Act, 1874.

Le May in the evening and night of July 4 was a person lodging in the house within the meaning of s. 10 of the Licensing Act, 1874, and during that night slept in a room in the house, which room had previously to that day been ordered by him, and the hire of which was paid for by him.

At 7 o'clock on that evening he had given a private dinner to a number of friends in the first-mentioned room of the "Greyhound," the room and dinner having been previously ordered by him of the appellant, and the room and dinner were paid for by him.

The friends had been previously invited by him by written invitation, and the room in which the dinner was given was during the whole of the evening kept for the sole and exclusive use of Le May and his said guests, and, with the exception of the appellant and the waiters attending upon them, no one was admitted into the room.

At 10 o'clock the house was duly closed to the public, but after that hour some of the guests of Le May remained in his company in the room in which the dinner had been given.

At and after the dinner and after 10 o'clock intoxicating liquors were supplied by the appellant and consumed in the room by Le May and his guests, but all of such liquors were supplied by the appellant upon the order and credit of Le May alone, and were sold to and paid for by him, and the persons who consumed the intoxicating liquors so supplied were his bonâ fide guests, and the whole of the intoxicating liquors so sold to him as aforesaid were consumed by him and his guests in the room reserved for him as aforesaid.

The appellant had not obtained any extension of time for supplying intoxicating liquors after closing hours.

1887

PINE v. BARNES.

The justices were of opinion that there was nothing in the Licensing Acts which enabled a licensed person to permit a lodger to entertain his friends in a licensed house after the closing hour, as it might open the door to a constant evasion of the spirit of the Acts, and that upon the facts before them, the charge laid in the information had been established. They therefore convicted the appellant.

The question for the opinion of the Court was whether their decision was right.

Dickens, for the appellant. By 37 & 38 Vict. c. 49 (The Licensing Act, 1874), s. 9, "Any person who during the time at which premises for the sale of intoxicating liquors are directed to be closed . . . . sells . . . . in such premises any intoxicating liquor, ... or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises," shall be liable to a penalty. That relates only to sales and to the consumption of liquor sold in contravention of the Act. But s. 10 declares that "nothing in this Act . . . . contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to bonâ fide travellers or to persons lodging in his house." Therefore it is no offence to sell it to a lodger, and it cannot reasonably be said that, if sold, the liquor may not be consumed on the premises. The sale to the lodger was legal, and therefore the consumption of it on the premises was no offence whether the liquor was consumed by the lodger or his friends.

The respondent did not appear.

POLLOCK, B. I think this conviction should be quashed. The justices acted on a laudable idea that if a licensed person might permit a lodger to entertain his friends in a licensed house after the closing hour "it might open the door to a constant evasion of the spirit of the Acts." They have found the facts, that a gentleman was a lodger in the licensed house, that he invited a number of gentlemen to a private dinner, to which they came; the dinner, at which exciseable liquors were drunk, took place, and the

1887

PINE v. BARNES.

Pollock, B.

eating and drinking went on until and after 10 o'clock, when the house was duly closed to the public; that, after 10 o'clock, intoxicating liquors were supplied by the appellant, and consumed in the room by Le May and his guests, "but all of such liquors were supplied by the appellant upon the order and credit of Le May alone, and were sold to and paid for by him, and the persons who consumed the intoxicating liquors so supplied were the bonâ fide guests of Le May, and the whole of the said intoxicating liquors so sold to Le May as aforesaid were consumed by him and his guests in the room reserved for him as aforesaid." We cannot, in my opinion, consider what may be the temptation to publicans or their lodgers to break the law on other occasions. We must consider only the facts of the present case, and we think that the liquor was supplied to and sold to Le May within the exception of s. 10, and whether it was all drunk by him or whether his guests drank their share of it was immaterial.

HAWKINS, J. I am of the same opinion. Sects. 9 and 10 are clear. [The learned judge read them.]

The latter part of s. 9, imposing a penalty on any person who "allows any intoxicating liquors although purchased before the hours of closing to be consumed" in licensed premises during hours at which they should be closed, seems intended to apply to such a case as that of a man who—not being a bonâ fide traveller—purchases liquor before the hour of closing and stays on the premises to drink it afterwards. By s. 10 nothing in the Acts shall preclude a publican selling intoxicating liquors at any time to persons lodging in his house, and I find nothing to prevent a lodger who has lawfully bought the liquor from allowing his bonâ fide guests to drink it. If such liquors are honestly bought by a bonâ fide lodger for himself, and he entertains his friends with the liquor which he had a right to buy and the publican had a right to sell to him I fail to see how the publican can be liable under the Act. I think the conviction was wrong. I agree that the justices should closely scrutinize the cases before them, because unless they do so the Act might be evaded. But if, on scrutinizing the evidence, as they seem to have done in the present case, they come to the conclusion that the case is bonâ

fide, and that the publican honestly sells and the lodger honestly buys liquor after closing hours, and it is consumed by the bonâ fide guests of the lodger, I see no reason why the justices should not find those facts and refuse to convict.

1887

PINE v. BARNES.

Conviction quashed.

Solicitors for appellant: *Sole, Turner & Knight.*

J. R.

[IN THE COURT OF APPEAL.]

THOMAS *v.* OWEN.

Oct. 26, 27; *Nov.* 2; *Dec.* 14.

Easement—Right of Way—Grant of Way by General Words—"Appurtenances."

The plaintiff and defendant were tenants under the same landlord of adjoining farms near the sea-coast, to which a highway ran through the defendant's farm; the plaintiff's farm communicated with the highway by a private road, which joined the highway at A. From a point on the plaintiff's farm and on the private road, an ancient lane ran to a spot on the highway nearer than A. to the sea-coast; this lane was not only the nearest way from the plaintiff's farm to the sea-coast, but was also level, whereas the private road was steep and hilly. The lane, which was a formed roadway bounded on either side by turf banks and hedges, ran wholly through the defendant's land, except for a few yards where it started from the private road on the plaintiff's farm, but it had no communication on either side with the defendant's land, and was only open to the defendant's access at the point where it joined the highway; it had been used for many years by the plaintiff, and had been from time to time repaired by him. Prior to 1873 the plaintiff and defendant were tenants from year to year of their respective farms; in that year the landlord granted to the defendant a lease of his farm, which contained no reference to the lane or to its user by the plaintiff; but the soil of the lane was admittedly included in the admeasurements of the defendant's farm. In 1878 the landlord granted to the plaintiff a lease of his farm "and all houses, buildings, and appurtenances thereto belonging," in which no specific mention was made of the lane or of any right of way over it. The defendant having interfered with the plaintiff's user of the lane:—

Held (affirming the decision of the Queen's Bench Division), that the lease to the defendant did not amount to a demise of the soil of the lane free from the plaintiff's right of way, inasmuch as the lessor, not being in possession at the date of the lease, could not make such a demise without derogating from the grant to the plaintiff under which his then existing tenancy was constituted; that there was an implied reservation of the right of way out of the defendant's lease; and that the right of way over the lane passed to the plaintiff by the lease of 1878 under the word "appurtenances."

APPEAL from a decision of the Queen's Bench Division (Mathew and Cave, JJ.), refusing to grant a new trial in an action

1887

THOMAS v. OWEN.

for obstructing a right of way in which the verdict and judgment had been entered for the plaintiff.

The following statement of facts is taken from the written judgment of Fry, L.J.

This is an action brought for interference with a right of way, and the question is whether the plaintiff has the right of way which he claims.

The plaintiff and defendant are tenants of adjoining farms in the Isle of Anglesey under Sir Richard Bulkeley, the plaintiff's farm being known as Ty Wian, and the defendant's farm as Caerau. A parish road leading from Llanrhyddlad to a place on the coast known as Cemlyn Bay passes through Caerau, the defendant's farm; the plaintiff's farm communicates with this highway by a road which from the plans and other evidence before us we hold to be a private road; this private road joins the parish road at a place called the Old Bar. From a point on the plaintiff's farm and on this private road, about half way between the homestead of Ty Wian and the Old Bar, a lane known as Lon Car Glas runs westward and leads from the plaintiff's farm and the private road to a spot on the parish road nearer to Cemlyn Bay than the Old Bar. It is therefore the nearest way from Ty Wian to Cemlyn Bay and the parts thereabouts, and besides being nearer than the private road it is level, whilst the private road is steep and hilly. The right of way claimed by the plaintiff is along this Lon Car Glas.

This lane is, we conclude from the evidence before us, an ancient lane; it is 418 yards in length and twenty-two yards wide; for a short distance on one side near its eastern end the lane is bounded by the plaintiff's land, but with this slight exception it has the defendant's land on both sides; it is bounded by turf banks with hedges on the top for its whole length; it has no communication on either side with the defendant's land. The roadway is made with cobble stones, and is partly grown over with grass. The lane is a made road perfectly visible; it is a long strip between two roads intersecting the defendant's farm, separated from that farm on both sides, and only open to the defendant's access at its western end, where it joins the parish road; it subserves no use for the defendant's farm except so far

as it may be grazed by his cattle, but it leads from the high road to the plaintiff's land and towards the plaintiff's farmhouse, and that is its only visible purpose and reason for existence.

Such is the present condition of the road, and such we conclude from the evidence had been its condition for thirty or forty years before the action was brought. It has for many years past been used by the plaintiff as occasion required, both for himself and his family, in going to chapel and elsewhere, and by his carts in bringing coal, gravel, seaweed and guano from Cemlyn Bay, and it has from time to time been repaired by him. These acts have been done by the plaintiff without asking or receiving permission from the defendant, and, until immediately before action, without interference on his part. We conclude from the evidence that the user for thirty or forty years past has been in accordance with the modern user by the plaintiff as we have stated it.

The defendant had occupied his farm prior to 1873 as tenant from year to year. But in that year he accepted a lease from Sir Richard Bulkeley under which he now holds. By that lease the landlord demised to the defendant, amongst other things, all those tenements usually known by the name of Caerau, containing by admeasurement 305*a.* 1*r.* 24*p.*, described as then in the tenure or occupation of the defendant. This description was followed by general words and by reservations of timber, mines, and game. The lease is silent as to the lane in question and any user thereof, but it is admitted by the plaintiff that the lane is comprised in the 305*a.* 1*r.* 24*p.* of Caerau.

The plaintiff had occupied his farm as tenant from year to year to Sir Richard Bulkeley down to the year 1878, when he accepted a lease from his landlord under which he now holds. By this instrument the lessor demised to the plaintiff the messuage known as Ty Wian, together with all the land and all houses, buildings and appurtenances thereto belonging, subject to reservations of timber, mines, and game. This lease contains no other general words than the word "appurtenances."

We think it a just inference or conclusion from the evidence before us that both in 1873 and 1878 the use of the lane in question was visibly necessary to the comfortable enjoyment of the plaintiff's farm in the manner in which it was enjoyed and had

1887

THOMAS v. OWEN.

been enjoyed at and before those dates respectively. We think, further, that in construing the leases of 1873 and 1878 we are bound to attend to the previous user of the plaintiff's and defendant's farms respectively: *Hall* v. *Lund.* (1)

The defendant interfered with the plaintiff's user of the lane, and thereupon this action was brought. It was tried before Mr. Commissioner McIntyre and a jury, who found that the plaintiff was entitled to a right of way along the lane by reason of user. Judgment was entered for the plaintiff accordingly. The Divisional Court having refused to grant a new trial, this appeal is brought.

Oct. 26, 27; Nov. 2. *Clement Higgins, Q.C.*, and *J. E. Vincent*, for the appellant. No right of way over the lane passed to the plaintiff under the lease of 1878. There are no words in that lease other than the word "appurtenances" which could carry such a right, and here there was no right of way appurtenant to the plaintiff's farm. It is true that the lane had been used by the plaintiff for some years prior to his lease, but there is no case in which it has been held that a right of way will pass under general words in a lease merely because there has been a de facto user prior to the granting of the lease; the first intimation of such a doctrine is contained in the judgment of Fry, L.J., in *Bayley* v. *Great Western Ry. Co.* (2), but the language there used is too general. It is true that a right of way has been held to pass under the word "appurtenances," but that has been in cases where the way has been a way of necessity, or where there has been a pre-existing easement, and not, as in the present case, a mere de facto enjoyment.

[FRY, L.J. Here there is a formed road, the only explanation of which is that it was obviously formed for the benefit and use of the plaintiff's farm; would it not pass under a lease of the farm without any other words at all?]

No; assuming that in 1878 there was a right of way and not a mere de facto user, it was neither apparent nor continuous, and only easements which are both apparent and continuous can be the subject of an implied grant: *Glave* v. *Harding.* (3).

(1) 1 H. & C. 676. (2) 26 Ch. D. 434. (3) 27 L. J. (Ex.) 286.

This is the view taken by Erle, C.J., in *Polden* v. *Bastard* (1), where he says, "There is a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognise this distinction, and it is clear law that upon a severance of tenements easements used as of necessity, or in their nature continuous, will pass by implication of law, without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner by appropriate language shews an intention that they should pass?" This passage is cited with approval by Mellish, L.J., in *Watts* v. *Kelson*. (2)

Secondly, the plaintiff having surrendered his tenancy from year to year could only take under the lease to him in 1878 what his lessor at that time had a right to grant; his lessor had previously granted to the defendant by the lease of 1873 his farm, including the soil of this lane, free from any incumbrance, and the plaintiff is therefore estopped from setting up a right of way over the defendant's farm which his lessor had no power to grant.

[They also cited *Kay* v. *Oxley* (3); *Pheysey* v. *Vicary* (4); *Plant* v. *James* (5); *James* v. *Plant* (6); Addison on Torts, p. 303.]

F. Marshall, for the plaintiff, was not called upon.

Cur. adv. vult.

Dec. 14. The judgment of the Court (Lord Esher, M.R., Bowen and Fry, L.JJ.) was delivered by

FRY, L.J. (The Lord Justice after stating the facts of the case as set out at the commencement of this report, proceeded as follows:—)

The main contention of the appellant has been that, even assuming the user as found by the jury and as we have stated it, the plaintiff cannot recover. The defendant has in addition raised certain contentions as to the facts, in respect of which we have already stated our conclusions. The evidence in our opinion

(1) Law Rep. 1 Q. B. 156, at p. 161.
(2) Law Rep. 6 Ch. 166.
(3) Law Rep. 10 Q. B. 360.
(4) 16 M. & W. 484.
(5) 5 B. & Ad. 791.
(6) 4 Ad. & E. 749.

1887

THOMAS v. OWEN.

Fry, L.J.

amply justifies the verdict and judgment in point of fact, if they can be justified in point of law. The defendant has contended before us that according to the true construction of the lease of 1873 Sir Richard Bulkeley thereby purported to demise to him Lon Car Glas free from all rights of way in the plaintiff, that the lessor was estopped by this lease, and that the plaintiff having taken a subsequent lease from Sir Richard Bulkeley is, like his lessor, estopped from denying the defendant's title to the lane free from any right of way. The defendant further contends that even if Sir Richard Bulkeley was able to grant a right of way to the plaintiff over Lon Car Glas, he did not in fact grant it by the lease of 1878 under which the plaintiff claims, and consequently that the plaintiff has no title to the way claimed.

With regard to the lease of 1873, it is not necessary to consider how the matter would have stood if the lessor had himself been in possession of the plaintiff's farm at the date of this lease to the defendant, for this was not the case. On the contrary, at the date in question the material facts stood thus: the farm, now the plaintiff's, was then in his occupation as tenant from year to year under Sir Richard Bulkeley; the lane in question was a made and fenced road, subsisting visibly for the convenience of the plaintiff's farm and of no use as a road to the defendant; it was and had been openly used by the plaintiff and his predecessors in title for many years and had been repaired by them; the right of using this road constituted an easement of the farm occupied by the plaintiff, and no demise could be made of the soil of the lane free from that right without derogating from the grant to the plaintiff under which his then subsisting tenancy was constituted. In this state of circumstances the presumption that the demise in question of Lon Car Glas was one free from any right of way is, in our opinion, rebutted by a consideration of these circumstances, just as in *Doe* d. *Freeland* v. *Burt* (1) the presumption that the demise of a house extended to the centre of the earth was rebutted by the existence at the time of the demise of the house of an earlier demise of a cellar by the same lessor and the occupation of that cellar by a person claiming under that demise.

(1) 1 T. R. 701.

1887

THOMAS v. OWEN.

Fry, L.J.

But then it is urged that alike in implied reservations and in implied grants a rule exists to this effect, that whilst such an implication may arise in the case of easements of necessity and continuous easements, it cannot arise in the case of easements which are neither of necessity nor continuous, and for this proposition *Polden* v. *Bastard* (1) is cited, and many other authorities might have been invoked. But on this principle, as established by such decisions, there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement (per Bramwell, B., in *Langley* v. *Hammond* (2); *Watts* v. *Kelson* (3)); and if the exception arises in the case of a grant we think it ought to arise in the case of a reservation made to support an earlier grant, as in the present case. For these reasons we are of opinion that the lease of 1873 was according to its true construction subject to the right of way over Lon Car Glas then existing in the plaintiff, and that consequently no question of estoppel can arise.

Then arises the question whether the lease of 1878 from Sir Richard Bulkeley to the plaintiff conveyed to him the right of way in question. Under the circumstances of this case as we have found them it appears to us to follow from the cases of *Watts* v. *Kelson* (3) and *Kay* v. *Oxley* (4), that the right to the way in question would pass if the lease had contained general words descriptive of easements and rights usually enjoyed with the demised hereditaments. But it was contended before us that the absence in the lease of 1878 of any other general words than the word "appurtenances" made an important difference and distinguished this case from the earlier authorities to which we have referred. No doubt the word "appurtenances" is not apt for the creation of a new right, and the word "appurtenant" is not apt to describe a right which had never previously existed; and therefore the mere grant of all appurtenances or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant. But from as long

(1) Law Rep. 1 Q. B. 156.
(2) Law Rep. 3 Ex. 161.
(3) Law Rep. 6 Ch. 166.
(4) Law Rep. 10 Q. B. 360.

1887

THOMAS v. OWEN.

FRY, L.J.

ago as the fourth year of Philip and Mary (*Hill* v. *Grange* (1)) the word "appurtenances" has easily admitted of a secondary meaning, and as equivalent in that case to "usually occupied." Here at the date of the lease of 1878 Lon Car Glas was not in the occupation of the lessor but in that of the defendant, and the defendant had, as we have held, acquired an estate in it as against which the right of way was reserved, and reserved for the benefit of the land and house of the plaintiff, and under these circumstances we think that the right of way did pass under the word "appurtenances." This conclusion is, we think, aided by sufficient authority. For which purpose it will suffice to refer to the cases of *Nicholas* v. *Chamberlain* (2), *Hall* v. *Lund* (3), and *Ewart* v. *Cochrane* (4). For these reasons we hold the judgment appealed from to be right, and dismiss this appeal with costs.

Appeal dismissed.

Solicitors for plaintiff: *Winter & Co., for D. Owen, Bangor.*

Solicitors for defendant: *Ullithorne, Currey, & Villiers, for Roberts & Laurie, Llangefni.*

W. J. B.

Dec. 12.

THE LONDON AND COUNTY BANKING COMPANY, LIMITED, AND OTHERS *v.* THE LONDON AND RIVER PLATE BANK, LIMITED.

Negotiable Instrument—American Railway Company—Share Certificate—Blank Transfer Power.

An American railway company, having its sole office in the United States, issued under its seal certificates for its share capital. Each certificate purported to certify that H. & Co., who were the company's correspondents in England, were entitled to twenty shares in the capital stock of the company "transferable only in person or by attorney on the books of the company." Upon the back of each certificate was indorsed a power of transfer under seal; it was in effect an absolute transfer of the shares represented by the certificate, followed by an irrevocable power of attorney "to the use of the above-named assignee to make and execute all necessary acts of assignment and transfer of the said stock in the books of the company;" this was signed by H. & Co., the names of the transferee and of the attorney being both left in blank. The object of the power was to enable an English holder to appoint an attorney to act for

(1) Plowd. 170.
(2) Cro. Jac. 121.
(3) 1 H. & C. 676.
(4) 4 Macq. 117.

him in America, where alone a transfer could be registered. It was proved that when thus signed in blank these certificates, by the usage of English bankers and dealers in public securities, were transferred by mere delivery, and were dealt with like bonds payable to bearer:—

Held, by Manisty, J., that the certificates were intended to pass by transfer only and not by mere delivery, and were not negotiable instruments.

ACTION tried before Manisty, J., and a special jury. At the trial the jury were discharged, and the case was referred to Mr. Arthur Charles, Q.C., as a special referee, to find the facts at issue by stating them in a special case for the opinion of the Court, or by making a report of and concerning the facts in such manner and form as to him should seem most convenient; the order further directed that the evidence taken before the special referee should be printed and returned with his findings. In pursuance of this order the special referee made a report, from which and from the printed evidence such of the facts as are material to the present report are taken.

The action was brought to recover possession of certain securities in the hands of the defendants, there being three plaintiffs, the London and County Bank, Robert Henry Capps, and John Record. The plaintiff Capps (who was treated in the judgment as the real plaintiff in the action) was a stockbroker in London and a member of the Stock Exchange, and the plaintiff Record was his manager. Record had a drawing account and also a loan account at the London and County Bank, which accounts were used for the purpose of Capps' business. He also had at the same bank a securities' account, and during the years 1882–83 loans were from time to time made by the bank upon the security of bonds and shares deposited with them from time to time by Record. In the years 1882–83 Capps had large business transactions, mostly speculative, with a stockbroker, not a member of the Stock Exchange, named Watters; Capps used to buy and sell for Watters in the market, making him from time to time advances upon securities deposited.

On the morning of October 1, 1883, Capps and Record were entitled to receive from their respective bankers upon satisfying their respective claims all the securities sought to be recovered in the present action; these included 200 shares of the Pennsylvania Railroad Company, and upon these the only question upon

1887

LONDON AND COUNTY BANKING COMPANY v. LONDON AND RIVER PLATE BANK.

which this case is reported arose. These shares had been originally deposited by Watters for value with Capps in June, 1883; they had been carried over by Capps in the market from time to time, and eventually on September 29 they were bought in by Capps for cash from the market; on the same day they were deposited by Record for Capps with the London and County Bank to secure a loan, and on the morning of October 1 they were in the hands of that bank as holders for value. They were represented by ten certificates for twenty shares each.

The Pennsylvania Railroad Company is an American company, with its head office in Philadelphia, and having no office in the United Kingdom. The share certificate, which is issued under the seal of the company and is signed by various officers, is in the following form:

"This certifies that Heseltine, Powell & Co. —— entitled to twenty shares in the capital stock of the Pennsylvania Railroad Company transferable only in person or by attorney on the books of the said company."

Upon the back of the certificate is indorsed the following bond:

"Know all men by these presents that the undersigned for value received Have bargained, sold, assigned, and transferred and by these presents Do bargain, sell, assign, and transfer unto

shares of the capital stock of the Pennsylvania Railroad Company, and do hereby constitute and appoint
true and lawful attorney irrevocably for and in name and stead, but to the use of the above-named assignee, to make and execute all necessary acts of assignment and transfer of the said stock on the books of the said company and attorneys one or more to substitute with the full power for the purposes aforesaid hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do by virtue hereof. In witness whereof have hereunto set hand and seal this
day of one thousand eight hundred and

Signed, sealed and delivered in presence of . . } Heseltine, Powell & Co. (L.S.)

Heseltine, Powell & Co., were the correspondents in England of the Pennsylvania Railroad Company.

All the securities given by Watters to Capps had, with many others, been stolen from the defendant bank by one Warden, who was then their secretary and manager. Watters had from time to time received these securities, knowing them to have been stolen, and had then used them for his own purposes in his business, raising money by depositing them with Capps and other persons who made him advances. The plaintiffs Capps and Record were wholly unaware of the transactions between Warden and Watters, and of the mode in which Watters obtained the securities deposited with them.

On October 1, 1883, the abstracted securities were wanted by Warden to shew to the auditors of the defendant bank at an audit held on that day of stocks and shares on which the defendants had advanced money to their customers. On the morning of that day Watters sent to the plaintiff Capps a cheque to pay off the loans on securities deposited by him with Capps (including the Pennsylvania shares), a cheque drawn by Capps was then paid in by Record to his account at the London and County Bank to release the securities there deposited, and these securities, among which were the Pennsylvania shares, were thereupon handed to Record. Record gave them to Watters, who handed them to Warden, by whom they were placed among the securities at the defendant bank, and exhibited to the auditors at the audit. Watters, however, was unable to redeem all the abstracted securities which he had received from Warden, Warden was unable to exhibit them to the auditors, and Warden's frauds upon the bank were at once discovered. Warden and Watters were subsequently tried and sentenced to penal servitude. The cheque which Watters gave to the plaintiff Capps for the purpose of redeeming the securities deposited with him was dishonoured. The defendant bank refused to give up the Pennslyvania shares and other securities to Capps, who thereupon (with the other plaintiffs) brought this action for their return on the ground that they were fraudulently obtained by Watters from the plaintiffs, and came subsequently into the possession of the defendants without their having given value for the same. The stocks and

1887

LONDON AND COUNTY BANKING COMPANY v. LONDON AND RIVER PLATE BANK.

shares obtained by Watters from the plaintiff Capps on October 1 were in most instances the identical ones that had been stolen from the defendant bank by Warden; but the Pennsylvania Railroad share certificates did not bear the same numbers as those originally held by the defendants; with the exception of the difference in numbers they were, however, identical with those stolen by Warden and deposited by Watters with Capps in June, 1883, and they were returned by Watters and Warden to the defendants instead of the securities originally stolen from them. The explanation of the difference in the numbers was that when Capps carried over in the market the shares left with him by Watters he deposited them with dealers against advances made to himself, and that when he took them up on September 29 the dealers handed to him certificates equivalent in value to, but bearing different numbers from, those so deposited. (1)

During the course of the case the question arose whether the Pennsylvania share certificates were negotiable instruments, and it is upon that point alone that the case (in which judgment was given for the defendants) is reported. The evidence given on behalf of the plaintiffs before the special referee shewed that the name of the registered owner was written in the body of the certificate, the indorsement on the back being described as a transfer power, the actual transfer being effected in the company's books. It was further proved that when the power of transfer was executed in blank the custom both of the Stock Exchange and of bankers was to transfer the certificates from hand to hand like a bill of exchange or a promissory note with an open indorsement, both the name of the transferee and of the attorney being left in blank. The dividends, being payable only in America, were paid to some one in that country for transmission to the registered owner (if not in America) or his nominee. It was also shewn by the official assignee of the Stock Exchange that there were different rules on the Stock Exchange applicable to securities deliverable to bearer, and to securities deliverable by deed

(1) The learned judge found as a fact that the defendants were bonâ fide holders for value of the substituted share certificates, inasmuch as when they received them they gave up any claim which they had against Warden and Watters in respect of the original shares.

of transfer, and that these shares were always dealt with under the former head. No evidence was given on behalf of the defendants, who admitted the practice of the Stock Exchange, but disputed its legal effect.

The finding of the special referee upon the question of negotiability was as follows: "With regard to the Pennsylvania Railway share certificates, it was proved that when signed in blank they pass from hand to hand by delivery on the Stock Exchange, and are dealt with in the market like bonds payable to bearer; both on the Stock Exchange and by bankers they are treated as negotiable instruments. The evidence given before me satisfied me that they are negotiable instruments."

Sir Horace Davey, Q.C., Finlay, Q.C., and *C. K. Francis*, for the plaintiffs.

Sir R. E. Webster, Q.C., A.G., R. T. Reid, Q.C., and *F. M. Abrahams*, for the defendants.

1887. Dec. 12. Judgment was this day delivered by

MANISTY, J. [The learned judge, having disposed of other points raised on the facts of the case, proceeded as follows:—] The question about the Pennsylvania shares is one of some difficulty. The learned arbitrator has found that in his opinion they are negotiable, because very strong evidence was given before him to shew that for a long time they had passed from hand to hand, and had been treated on the Stock Exchange (and I may say generally treated) as negotiable instruments. Now what is this instrument which is said to be a negotiable instrument? It is a very extraordinary document. It is sealed with the seal of the company, and signed and counter-signed, entered by the secretary and registered, and on the face of it it certifies that Heseltine, Powell & Co., are entitled to twenty shares in the capital stock of the Pennsylvania Railroad Company, "transferable only in person or by attorney on the books of the said company." Then on the back is the power of attorney signed in blank by Heseltine, Powell & Co. In that the name of the transferee is left blank, and Heseltine, Powell & Co. therefore give authority to whoever may hold this document to put in any name he pleases; and there is a further blank left for the name

1887

LONDON AND COUNTY BANKING COMPANY v. LONDON AND RIVER PLATE BANK.

Manisty, J.

of the attorney, who has also a power of substituting attorneys for himself. That is an extraordinary document, and I do not find in any other case anything like it. The effect of it, as it seems to me, is that Heseltine, Powell & Co. continued to be the owners of this certificate until the power of attorney was acted upon, and a transfer made and entered and registered in the company's books, for the company would only recognise the transferee in person or by attorney. There are numerous cases upon other documents, but they afford no assistance here.

I think it is clearly proved that this document is treated as a negotiable instrument; but that is not enough. I shall refer to one or two cases upon this point, but the whole of the law applicable to it is to be found in Smith's Leading Cases, in the notes to *Miller* v *Race*. (1) It is there stated, at p. 502, in the following language: "The general rule of the law of England is, that no man can acquire a title to a chattel personal from any one who has himself no title to it, except only by sale in market overt: *Peer* v. *Humphrey*. (2) Nemo dat quod non habet." This is a well-known principle. But then comes the case of negotiable instruments. What is a negotiable instrument? The answer to this question will be found a little further on in the same note, at p. 504: "A negotiable instrument being clearly transferable by any person holding it, so as by delivery thereof to give a good title 'to any person honestly acquiring it,' per Abbott, C.J., 3 B. & C. 47 (3), the next question is, what instruments may with propriety be termed negotiable. And to this it may be answered, that whenever an instrument is such that the legal right to the property secured thereby passes from one man to another by the delivery thereof, it is, properly speaking, a negotiable instrument, and the title to it will vest in any person taking it bonâ fide, and for value, whatever may be the defects in the title of the person transferring it to him. An instrument is called negotiable when the legal right to the property secured by it passes by its delivery, because, although an instrument may be saleable in the market, and treated in many respects like cash, yet, if by a transfer of it nothing pass but a right to sue on it in the name of the transferor"—which is this case—"or original

(1) 1 Sm. L. C. 9th ed. 491.
(2) 2 A. & E. 495.
(3) The reference is to *Gorgier* v. *Mieville*, 3 B. & C. 45.

party to it, such an instrument is not properly speaking negotiable." On the next page (p. 505) is the following passage, with which I quite agree: "It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, there it is entitled to the name of a negotiable instrument, and the property in it passes to a bonâ fide transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i.e., if it be either not accustomably transferable"—which this is—"or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it pro tempore, it is not a negotiable instrument, nor will delivery of it pass (otherwise than by estoppel) the property of it to a vendee, however bonâ fide, if the transferor himself have not a good title to it, and the transfer be made out of market overt." Now it seems to me clear that this instrument could not be sued upon by the person holding it pro tempore, and could not therefore be negotiable, because when it was handed over by the transferor with this blank power of attorney, it could not be sued upon by that person until it was transferred on the register.

Then comes another important matter to be considered as to the negotiability. It seems to be the opinion of eminent lawyers, though I do not say that it has been actually judicially determined, that if the right of suing upon an instrument does not appear upon the face of it to be extended beyond one particular individual, no usage of trade, however extensive, will confer upon it the character of negotiability. That is most important, if it be sound law. If on the face of the instrument it appears to be intended that the right of suing should not be so extended, and that the only parties who can really become the owners are the parties to whom it is granted or persons to whom it is transferable on the register—if that be sound law, it seems to me to follow that this is not a negotiable instrument. I come to that conclusion with very great diffidence, because the learned referee came to an opposite one; he thought that, inasmuch as this certificate is by the custom of trade upon the Stock Exchange transferable from hand to hand the same as a bank-note, it fell

1887

LONDON AND COUNTY BANKING COMPANY v. LONDON AND RIVER PLATE BANK.

Manisty, J.

within the category of negotiable instruments: I confess that I am unable to take the same view. The case usually referred to upon this point is *Crouch* v. *Crédit Foncier of England* (1), which was a very curious case, more on account of the general principle than of the actual facts. There, as appears from the head-note, the defendants, a limited company registered under the Companies Act of 1862, sold to M. a document under the seal of the company, and signed by two directors and the secretary. It was numbered and headed with the name of the company, and called "Debenture," and proceeded thus: "The company hereby promise, subject to the conditions endorsed on this debenture, to pay to the bearer 100*l.* on the 1st May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off or redeemed, according to the conditions indorsed hereon, and interest at 8 per cent. on the 1st November and the 1st May in each year; and also a further sum of 10*l.* by way of interest or bonus at the same time as the principal sum is paid off." By the conditions indorsed a certain number of the bonds were to be drawn for twenty-one days before the days for the payment of the half-yearly interest; and any bond drawn was to be advertised and paid off with the interest and bonus due, the bond being given up, and no further interest being payable.

In July, 1869, the bond was stolen from M. In October, 1870, the number of the bond was drawn. At the end of 1871 the plaintiff purchased the debenture from S., who had since absconded. The defendants, having notice of the robbery, refused to pay the debenture to the plaintiff, who brought an action in his own name, alleging that he was the lawful bearer of the debenture. At the trial it was admitted that similar documents had been treated as negotiable; it was also admitted that the plaintiff derived title from the thief; but the jury found that the plaintiff had given value for the debenture without notice. It was held that the contract contained in the conditions prevented the debenture from being a promissory note, even if it had been under hand only; secondly, that it was not competent to the defendants to attach the incident of negotiability to such instruments, contrary to the general law; and that the custom to treat them as negotiable, being of recent origin and not the law

(1) Law Rep. 8 Q. B. 374.

merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law. Upon the particular circumstances of that case, the debenture being payable to the person who might be the holder at the time of the drawing, and the plaintiff having bought it after the drawing, the Court held that the instrument was not negotiable and that the plaintiff could not recover. I am quite aware that this decision has been the subject of comment by the late Lord Chief Justice Cockburn in *Goodwin* v. *Robarts.* (1) In that case the document in question was the scrip of a foreign loan, which passed from hand to hand like a bank-note, and the case was decided upon the doctrine of estoppel, a doctrine which has no application to the present case, although there are cases where documents, which would not be held to be negotiable instruments, would pass upon the principle of estoppel. No doubt the comments of that very learned judge are entitled to great weight; but I cannot think that they ought to prevail against that which seems to have been very clearly decided in *Crouch* v. *Crédit Foncier of England* (2); and I think that both upon the authorities as they stand and also upon principle, having regard to the fact that this share certificate was on the face of it intended only to pass by transfer and not by delivery, it is not a negotiable instrument; the present is indeed to my mind a very strong case, much stronger than that of *Crouch* v. *Crédit Foncier of England.* (2) As to these Pennsylvania shares I have therefore come to a conclusion contrary to that arrived at by the learned referee, and I hold that they ought not to be treated as negotiable instruments.

Judgment for the defendants.

Solicitors for plaintiffs: *Harries, Wilkinson, & Raikes.*
Solicitors for defendants: *Michael Abrahams, Son, & Co.*

(1) Law Rep. 10 Ex. 337; see also 1 App. Cas. 476.
(2) Law Rep. 8 Q. B. 374.

W. J. B.

[1948] P. 125

1887
Dec. 7.

THE QUEEN *v.* THE JUDGE OF THE COUNTY COURT OF SHROPSHIRE, HOLDEN AT NEWPORT, AND ANOTHER.

County Court—Jurisdiction—Warrant of Execution—Goods in Foreign District—Negligence of High Bailiff of Foreign Court—Jurisdiction over High Bailiff of Judge of Court out of which Warrant originally issued—Prohibition—County Courts Act, 1846 (9 & 10 *Vict. c.* 95), *ss.* 104, 115.

The jurisdiction given by s. 115 of the County Courts Act, 1846, to a county court judge, enabling him to order a bailiff to compensate a plaintiff who has suffered damage by his neglect, connivance, or omission in levying an execution can only be exercised by him against the bailiffs of his own court.

Execution was issued in a county court, and the warrant was sent for execution to a foreign county court, and the high bailiff of such court was guilty of negligence in levying under it:—

Held, that the judge of the home court had no power under s. 115 to order the high bailiff of the foreign court to pay damages to the plaintiff, who had been injured by his negligence, and that the high bailiff was entitled to a prohibition.

APPLICATION to set aside a writ of prohibition, referred by Field, J., to the Court. The circumstances under which the application was made are as follow:—

William Ashley, who resided in the district of the Newport County Court, obtained a judgment in that court against one Emery for 1*l.* 7*s.* 5*d.*, and in April, 1887, he issued execution against him for that amount. At that time Emery resided within the jurisdiction of the Stone County Court, and the warrant of execution was under the provisions of s. 104 of the County Courts Act, 1846, sent to the registrar of the Stone Court for execution. On April 14 the high bailiff of the Stone Court received the warrant for execution, and on April 30 his sub-bailiff made a return to the Stone Court: "No effects; goods would not pay costs," but this return was not sent to the Newport Court. No return having been made to the Newport Court, on August 18 the execution creditor applied to the judge of that court for an order against the high bailiff of the Stone Court under s. 115 of the County Courts Act, 1846, alleging negligence in the execution of the warrant, and the judge made an order against the high bailiff. The order, which was signed by the registrar of the Newport Court, and directed to the "High Bailiff, County Court, Stone," was as follows:—

"Ashley *v.* Emery.

"On the application of the above-named plaintiff, made the

18th August, 1887, it is ordered that on or before the 6th October next you do pay to me, for the use of the said plaintiff, the sum of 1*l.* 10*s.* 5*d.*, as compensation for neglect to levy execution against the goods and chattels of the above-named defendant."

On September 30 the solicitors for the high bailiff gave notice to the execution creditor and to the registrar of the Newport Court of his intention to apply to the court to annul the order or to grant a new trial, on the ground that he had not committed any act of negligence, connivance or omission, and on October 6 such application was made to the judge of the Newport Court, but refused with costs. The execution creditor's costs of this application having been taxed at 1*l.* 16*s.* 10*d.*, an order was sent to the high bailiff on October 13, directing him to pay the sum of 3*l.* 7*s.* 3*d.* to the registrar of the Newport Court on or before October 20. On October 25 execution was issued against the high bailiff and forwarded to him, and on the same day an order was made by Pollock, B., at chambers, ex parte, on the application of the high bailiff, prohibiting any further proceedings on the orders of August 18 and October 6. The execution creditor having taken out a summons at chambers to set aside the order for a prohibition, the matter was referred by Field, J., to the Court.

There was a conflict of evidence in the affidavits used by the parties as to whether the high bailiff had waived or insisted upon his objection to the jurisdiction of the judge of the Newport Court upon the occasion of the application on October 6. (1)

(1) By s. 104 of the County Courts Act, 1846 (9 & 10 Vict. c. 95): "In all cases where a warrant of execution shall have issued against the goods and chattels of any party, ... and such party, or his goods and chattels, shall be out of the jurisdiction of the court, it shall be lawful for the high bailiff of the court to send such warrant of execution . . . . to the clerk of any other court constituted under this Act, within the jurisdiction of which such party, or his goods and chattels, shall then be or be believed to be, with a warrant thereto annexed, under the hand of the high bailiff and seal of the court from which the original warrant issued, requiring execution of the same, and the clerk of the court to which the same shall be sent shall seal or stamp the same with the seal of his court, and issue the same to the high bailiff of his court, and thereupon such last-mentioned high bailiff shall be authorized and required to act in all respects as if the original warrant of execution . . . . had been directed to him by the court of which he is the high bailiff, and shall . . . . return to the high bailiff of the court from which the same originally issued what he shall have done in the execution of such

1887

THE QUEEN v. JUDGE OF COUNTY COURT OF SHROPSHIRE.

Corrie Grant, for the execution creditor. The judge had jurisdiction under s. 115 of the County Court Acts of 1846 to make the order, and in doing so was merely exercising his regular power of punishing high bailiffs for negligence. Under that section power is given to a county court judge to fine his own high bailiff for neglect in his duties within his jurisdiction, while s. 104, which deals with the execution of warrants sent to a foreign court, provides that the high bailiff of the foreign court shall be authorized and required to act in all respects as though the warrant had been issued to him by his own court. This provision has the effect of making the high bailiff of a foreign court, who is charged with the execution of a warrant, the high bailiff of the home court for that purpose.

[HAWKINS, J. He is only to execute the original warrant when it has been sealed by the registrar of his own court, and he only derives his authority through his own court.]

But he has to return the warrant when executed to the home court, and must pay over the amount of the levy to that court, and he is therefore acting as the officer of that court.

The high bailiff has waived his rights by appearing before the judge of the Newport Court and submitting to the jurisdiction.

Bucknill, Q.C., and *Woodgate*, for the high bailiff, were not called upon.

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process, and in case a levy shall have been made, shall, ..., pay over all moneys received in pursuance of the warrant to the high bailiff of the court from which the same shall have originally issued, retaining the fees for execution of the process . . . ."

By s. 115: "In case any bailiff of the said court who shall be employed to levy any execution against goods and chattels shall, by neglect, or connivance or omission, lose the opportunity of levying any such execution, then upon complaint of the party aggrieved by reason of such neglect, connivance or omission (and the fact alleged being proved to the satisfaction of the court on the oath of any credible witness), the judge shall order such bailiff to pay such damages as it shall appear that the plaintiff has sustained thereby, not exceeding in any case the sum of money for which the said execution issued, and the bailiff shall be liable thereto; and upon demand made thereof, and on his refusal so to pay and satisfy the same, payment thereof shall be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said court."

By s. 8 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), the title of "clerk" of the county court is altered to that of "registrar."

POLLOCK, B. The question in this case is one of considerable importance, and is raised for the first time in the superior courts. It arises thus: an application for a prohibition, supported by a voluminous affidavit, was made to me at chambers. It is the practice not to grant such applications ex parte, unless the matter be very urgent, but as it was shewn to me that such urgency existed in the present case, I made the order. An application to set aside my order was subsequently made at chambers, which came on before my brother Field, and was referred by him to the Court. The substantial question for our decision may be shortly stated. It appears that Norris, the applicant, was the high bailiff of the Stone County Court, and that a writ of fi. fa. was sent to him for execution upon a defendant living within the jurisdiction of that court from the Newport County Court, and it is alleged that he was guilty of negligence in respect of the execution of the writ. Thereupon the plaintiff went before the judge of the Newport County Court, who heard the statement of the plaintiff, and made an order that the applicant should pay the amount of the judgment for which execution had been issued to the registrar of the Newport Court. I do not stop to inquire whether the judge could have ordered the money to be paid to the plaintiff direct, or whether he was right in ordering it to be paid to the registrar. The question before us is this: whether, when a warrant is sent from the home court for execution on the goods of a defendant resident within the jurisdiction of a foreign court, and, after transmission of the warrant to the foreign court, the high bailiff of that court is guilty of negligence in its execution, he is amenable to the home court in respect of his negligence. To arrive at a decision a careful consideration of the sections of the Act of Parliament is necessary. What is the nature of the office of high bailiff? Like all the officers of modern courts, he is the creation of the legislature. By 9 & 10 Vict. c. 95, provision was made for the punishment of high bailiffs, but what is the nature of their appointment? It is enacted by s. 31 of the County Court Act of 1846 that there shall be a high bailiff to each particular court, who is subject to removal by the judge, and who may appoint bailiffs to assist him in his duties. Then by s. 13 of 29 & 30 Vict. c. 14,

1887

THE QUEEN v. JUDGE OF COUNTY COURT OF SHROPSHIRE.

Pollock, B.

no person is to be the high bailiff for more than one court, and by s. 33 of the Act of 1846 the high bailiff is required to attend each sitting of the court. He is therefore an officer of the court to which he is attached and by the judge of which he is appointed. Now comes the question of misconduct by the bailiff. If he is an officer of that court by the judge of which he is appointed, who is to be the judge to summon him before him if he has been guilty of "neglect, connivance, or omission"? In my opinion it is clearly the judge of that court whose bailiff he is. It is argued that this question is determined by the provisions in the latter part of the Act relating to the transmission of writs of execution from the home court to the foreign court; these are chiefly contained in s. 104. [The learned judge read the section.] It is clear from the language there used that the high bailiff is to receive, execute, and act upon the writ, not because it comes to him from a foreign court, but because it has been stamped and handed to him by the clerk (now called the registrar) of his own court. Any act of disobedience of which he may be guilty is an act of disobedience against his own court. It is unnecessary to enter into the question of inconvenience, although that affords cogent arguments to shew that our construction of the Act is the right one, for it is difficult to see the propriety of the judge of a court in Yorkshire adjudicating on the conduct of a high bailiff in Exeter because he has been guilty of negligence in that city.

Another point has been raised before us. It is common knowledge that, to a certain extent, a person coming for a prohibition is liable to be told that he is not entitled to it because he has submitted to the jurisdiction which he seeks to prohibit. Sometimes the question is quite plain, as where it is wholly immaterial whether a case is tried in one county or another, and a party goes before the judge, though he is not bound to go; he not merely goes because it is the most convenient course, but he gets the benefit of the jurisdiction, and cannot then be heard to say that the whole proceedings were without jurisdiction. But there is no analogy between such a case and one where jurisdiction is enforced in pœnam against a man. The High Court does not grant prohibition merely for the benefit of the

party, but in order to keep an inferior court within its jurisdiction; this is clear from the fact that a stranger to a suit may apply for prohibition. Then is there any ground for saying that where the proceedings are of such a nature as those we are inquiring into, a prohibition should not go? I think not. In the *Mayor of London* v. *Cox* (1), Willes, J., says: "There is indeed a distinction after sentence between a patent and a suggested defect, for if the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior court, and is defeated, then, if the defect be of power to try the particular issue only (defectus triationis, as it has been called), the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause (defectus jurisdictionis), and that defect be apparent upon the proceedings, a prohibition goes after sentence." The learned judge then refers to *Roberts* v. *Humby* (2), where Parke, B., cites with approval a judgment of Lord Mansfield to the same effect. It is therefore a matter of high prerogative of the High Court that it should grant a prohibition where it is shewn on the face of the proceedings that an inferior court has exceeded its jurisdiction, and that being the case here, the prohibition must go.

HAWKINS, J. I am of the same opinion, and would add nothing were it not for the importance of the question whether the high bailiff of a foreign court is subject to the jurisdiction of the home court. I take it for granted, that in levying execution within the district of the Stone County Court, there was negligence in respect of which the high bailiff of that court was responsible to some one. The judge of the Newport Court thought he was responsible to him, and made the order complained of, an order issued from the Newport Court and directed to the high bailiff of the Stone Court. Had the judge jurisdiction to make that order? I think not. By s. 27 of the Act of 1846, the clerk of each court is to issue summonses and writs of execution; by s. 31, a high bailiff is appointed, whose duty it is to execute all warrants issued out of the court, and s. 57 provides that a seal shall be kept for each county court and that all

(1) Law Rep. 2 H. L. 239, at p. 282. (2) 3 M. & W. 120.

1887

THE QUEEN v. JUDGE OF COUNTY COURT OF SHROPSHIRE.

Hawkins, J.

documents shall be stamped with it. Is any light thrown by these sections on s. 104, by which it is provided that warrants of execution may be transmitted to foreign courts? The legislature might have directed that such warrants should be sent to the high bailiff of the foreign court, but under that section it is the clerk of the foreign court to whom they are to be sent; he is to stamp them with the seal of his own court and to issue them to the high bailiff of his own court, just as execution is issued from his own court; the process is regarded in all respects as the execution of the home court re-issued in the foreign court, and must be treated as though it had been originally issued in the foreign court. Then comes s. 115, by which a high bailiff is made answerable for his neglect to levy execution, and in my judgment the high bailiff of the court to which a warrant of execution is remitted by another court in which judgment has been signed is responsible only to the judge of his own court, and the judge of the other court has no jurisdiction over him. I am therefore clearly of opinion that this order was made without jurisdiction.

As regards the question of waiver I agree with my brother Pollock, and will only refer to the case of *Knowles* v. *Holden*. (1) There the parties to a plaint in the county court appeared before the judge and consented to a reference to arbitration without objecting to his want of jurisdiction over the case; but during the reference one of the parties objected to the jurisdiction of the arbitrators on the ground that the title to land was in question; and the Court held that he was entitled to a prohibition as he had not given the county court jurisdiction by attending before it and not taking the objection. In the present case the whole jurisdiction of the judge of the Newport Court depends on s. 115, and the mere acquiescence of the parties cannot give him a jurisdiction not given by the statute.

Solicitors for the execution creditor: *Oldman & Clabburn, for Elliott & Watson, Newport.*

Solicitors for the high bailiff: *Keen & Rogers, for Middleton & Norris, Stone.*

(1) 24 L. J. (Ex). 223.

W. J. B.

IN RE GARDINER. EX PARTE COULSON.

1887
Nov. 22.

Bankruptcy—Husband and Wife—Married Woman—Separate Estate—Debt contracted after Marriage—Non-Trader—Bankruptcy Notice—Liability to Bankrupt Law—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5—*Bankruptcy Act*, 1883, *s.* 4, *sub-s.* 1 (*g*), *s.* 152.

A married woman, possessed of separate estate, but not carrying on a trade separately from her husband, is not subject to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under s. 4 of the Bankruptcy Act, 1883.

APPEAL from an order of the registrar of the county court of Kingston-on-Thames setting aside a bankruptcy notice.

The facts of the case were shortly as follows: The debtor, Lucy Georgina Gardiner, a married woman, was sued jointly with one Fooks by one Coulson, who was the holder of a bill of exchange of which she was the acceptor and Fooks was the drawer, and upon May 16, 1887, judgment was entered against them for the amount of the bill and costs. Omitting formal parts the judgment, so far as it affected the debtor, was in the following terms: "As regards the defendant, Lucy Georgina Gardiner, execution to be limited to her separate estate not subject to any restraint on anticipation (unless by reason of the Married Women's Property Act, 1882, such estate shall be liable to execution notwithstanding such restraint)." The debtor not having paid the amount of the judgment, a bankruptcy notice was on June 30 issued against her by Coulson. On July 21 the debtor applied to the registrar of the county court of Kingston-on-Thames to set the bankruptcy notice aside, the ground disclosed in her affidavit being that, as she was a married woman married before the coming into operation of the Married Women's Property Act, 1882, and a non-trader, she was not liable to the provisions of the Bankruptcy Act, 1883. It was admitted before the registrar that the debtor was possessed of separate estate. The registrar relied on s. 152 of the Bankruptcy Act, 1883, and being of opinion that s. 1, sub-s. 5, of the Married Women's Property Act, 1882, was not affected by the Bankruptcy Act, 1883, and that the debtor was not liable to bankruptcy proceedings unless she was carrying

1887

IN RE GARDINER. EX PARTE COULSON.

on trade separately from her husband and was also possessed of separate property, made an order setting aside the bankruptcy notice. Coulson, the judgment creditor, appealed.

By s. 1, sub-s. 5, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75): "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole."

By s. 4, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): "A debtor commits an act of bankruptcy in each of the following cases . . .

"(*g.*) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice . . . comply with the requirements of the notice. . . ."

By s. 152 of the latter Act: "Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882."

Winslow, Q.C., and *L. E. Pyke*, for the appellant. The judgment in its present form creates a personal liability on the debtor; it is the same as an ordinary judgment with the addition of a provision as to execution, and is therefore not covered by the decision in *Scott* v. *Morley*. (1) There is nothing in the Married Women's Property Act, 1882, or the Bankruptcy Act, 1883, to prevent a married woman being made a bankrupt in respect of her separate estate, the receiving order being applicable to the separate estate of which she is possessed.

[They cited *Dillon* v. *Cunningham* (2); *Poole* v. *Canning* (3); *Lavie* v. *Phillips* (4); *Ex parte Holland, In re Heneage* (5); *Ex parte Jones, In re Grissell.* (6)]

Herbert Reed, for the respondent, was not called upon.

(1) Ante, 120.
(2) Law Rep. 8 Ex. 23.
(3) Law Rep. 2 C. P. 241.
(4) 3 Burr. 1776.
(5) Law Rep. 9 Ch. 307.
(6) 12 Ch. D. 484.

1887

IN RE GARDINER. EX PARTE COULSON.

CAVE, J. This is an appeal from an order of the registrar of the Kingston County Court setting aside a bankruptcy notice against a married woman, who admittedly did not carry on a trade separately from her husband. I am clearly of opinion that the order was right, and upon two grounds. Before the passing of the Married Women's Property Act, 1882, a married woman could not be made a bankrupt, even though she had separate estate and had entered into contracts after her marriage; that is decided in so many words in *Ex parte Jones, In re Grissell* (1); but if she were trading under the custom of the city of London she became subject to the bankrupt laws. When the Act of 1882 was passed it enacted that every woman carrying on a trade separately from her husband should, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole; that is to say, it extended the custom of the city of London to married women generally, and confined the liability to bankruptcy to the case of married women trading separately from their husbands; unless therefore a married woman falls within this class of persons she is not subject to the bankruptcy laws, and she cannot commit an act of bankruptcy under s. 4 of the Bankruptcy Act, 1883. This appears to me to be a clear and conclusive answer to this application, but there is, I think, another equally good. The Court of Appeal has held in *Ex parte Blanchett, In re Keeling* (2), that s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, must be strictly construed, and that it is not to be extended to cases that are not clearly within it; and the words used in that sub-section in defining the act of bankruptcy are, "if a creditor has obtained a final judgment against him for any amount," &c. But the judgment obtained here is not a final judgment against the married woman; it creates no personal liability at all, but is a judgment against her property, not against herself, a distinction which is well pointed out by the Court of Appeal in *Scott* v. *Morley*. (3) If there can be any doubt that the judgment alluded to in that sub-section is a personal judgment, it will be cleared up by what follows upon that requirement; there must be served on the debtor a bankruptcy

(1) 12 Ch. D. 484.

(2) 17 Q. B. D. 303.

(3) Ante, 120.

1887

IN RE GARDINER. EX PARTE COULSON.

Cave, J.

notice requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court. Now in the present case there is no obligation on the married woman to pay the judgment debt, there is only a right in the creditor to make her property available for its payment; she is under no personal liability to pay, and there is no debt due from her which she can be forced to pay or to secure or compound for. Either of these reasons is sufficient to justify the order of the registrar.

A. L. SMITH, J., concurred.

Appeal dismissed.

Solicitors for appellant: *Pyke & Minchin.*
Solicitors for respondent: *Mear & Fowler.*

W. J. B.

Dec. 15.

ARROWSMITH, APPELLANT; DICKENSON AND ANOTHER, RESPONDENTS.

Poor Law—Relief—Second Marriage—Liability of Children of First Marriage to maintain Mother living with Second Husband—43 Eliz. c. 2, s. 7; 4 & 5 Wm. 4, c. 76, ss. 56, 57.

A woman and her second husband became chargeable to a parish, and received from it a weekly sum as outdoor relief, which was paid to the husband:—

Held, that the children of the woman by a former husband were liable under 43 Eliz. c. 2, s. 7, to relieve and maintain her, and therefore to contribute towards such relief for her maintenance, and that their liability was not affected by 4 & 5 Will. 4, c. 76, s. 56, enacting that all relief to a wife shall be considered as given to her husband.

CASE stated by justices for Cheshire under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

Upon the hearing of a complaint by the appellant on behalf of the guardians of the Northwich Union against the respondents under 43 Eliz. c. 2, s. 7; 59 Geo. 3, c. 12, s. 26; 4 & 5 Wm. 4, c. 76, s. 56, and 31 & 32 Vict. c. 122, s. 36 (1), charging that Ann

(1) By 43 Eliz. c. 2, s. 7, "The father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices . . . at

Egerton was poor and impotent, and unable to work or maintain herself, and was then residing in the union, and was chargeable and was likely so to continue, and that they were the sons of the pauper, and were of sufficient ability at their own charges to relieve and maintain her—the justices dismissed the complaint.

It appeared that the respondents were the sons of the pauper by a former husband, and that she was married to her present and second husband, Samuel Egerton, about thirty years ago, and was living with him. The pauper and her present husband were both in receipt of outdoor relief at the rate of 3*s.* a week each from the Northwich Union. Such relief was paid weekly in one sum of 6*s.* to Samuel Egerton. Samuel Egerton was the stepfather of James Dickenson and Thomas Dickenson, but no blood relation. The respondents were both single men, each earning about 22*s.* a week and residing with their stepfather, and paying him for their food.

On the part of the appellant it was contended that the respondents were of sufficient means and ability, and that an order should be made on them under the statutes above referred to, or some of them, to contribute towards the relief given by the said union to their mother, and that the relief given by the union to the pauper was distinct from the relief given to Samuel Egerton.

On the part of the respondents it was contended that 4 & 5

their General Quarter Sessions shall be assessed; upon pain that every one of them shall forfeit twenty shillings for every month, which they shall fail therein."

By 4 & 5 Will. 4, c. 76, s. 56, "All relief given to or on account of the wife, or to or on account of any child or children under the age of sixteen, not being blind or deaf or dumb, shall be considered as given to the husband of such wife, or to the father of such child or children, as the case may be, and any relief given to or on account of any child or children under the age of sixteen of any widow shall be considered as given to such widow: Provided always, that nothing herein contained shall discharge the father and grandfather, mother and grandmother, of any poor child, from their liability to relieve and maintain such poor child in pursuance of" 43 Eliz. c. 2.

By s. 57 a stepfather is liable to maintain his step-child or step-children "as a part of his family, and shall be chargeable with all relief . . . granted to or on account of such child or children until such child or children shall respectively attain the age of sixteen, or until the death of the mother; . . . and such child or children shall, for the purposes of this Act, be deemed part of such husband's family."

1887

ARROWSMITH v. DICKENSON.

Wm. 4, c. 76, s. 56, enacts that relief given to or on account of the wife shall be considered as given to the husband of such wife, and that, therefore, in this case, if the justices ordered the respondents to contribute towards the relief given to Ann Egerton, such contribution must be considered as given to Samuel Egerton, her husband, who was not one of the persons towards whose relief the respondents were under any liability to contribute; and that the respondents were not of sufficient ability or in the class intended to be included in the said statute of 43 Eliz. c. 2, s. 7.

The justices being of opinion that the relief of 6*s.* was one relief given to Samuel Egerton, and that no authority had been shewn to them by force of which they could order a man to contribute towards relief given to his step-father, and that the proviso at the end of the above s. 56 of 4 & 5 Wm. 4, c. 76, did not name "children" amongst those who should not be discharged "from their liability to relieve and maintain;" gave their determination against the appellant in the manner before stated.

The questions for the opinion of the Court upon which this case was stated were:

(*a.*) Whether or not the outdoor relief given by the said union was one relief and was under 4 & 5 Wm. 4, c. 76, s. 56, to be considered as given to Samuel Egerton.

(*b.*) If it was one relief and so given, whether the respondents were, nevertheless, under the statute of 43 Eliz. c. 2, s. 7, or the subsequent statutes above referred to, or any of them, liable to contribute towards such relief while their mother, Ann Egerton, remained the wife of Samuel Egerton and living with him.

(*c.*) If so, whether they were persons contemplated by the 43 Eliz. c. 2, s. 7.

Marshall, for the appellant. The respondents being the "children of a poor person not able to work," are bound to maintain her: 43 Eliz. c. 2, s. 7, unless they are relieved by the Poor Law Amendment Act, 1834 (4 & 5 Wm. 4, c. 76). But they are not so relieved. Sect. 56, enacting that relief to a wife shall be considered as given to her husband, and that relief to a child

under sixteen shall be considered as given to its father or widowed mother, as the case may be, has reference to questions of status, settlement, and removal only, and the proviso corresponds with the former part of the section, and therefore does not deal with the liability of children to maintain their parents. By 13 & 14 Car. 2, c. 12, s. 1, persons likely to become chargeable to one parish might be removed from it. But by 35 Geo. 3, c. 101, s. 1, they can only be removed if actually chargeable. The 56th section of 4 & 5 Wm. 4, c. 76, is a legislative exposition with respect to removal of what relief to a child shall make the parent chargeable: *Reg.* v. *St. Mary, Islington.* (1) In *Reg.* v. *Shavington-cum-Gresty* (2) Lord Campbell, C.J., said (3) "that the object of s. 56 was to render persons removable with their families when they had become chargeable."

Joseph Smith, for the respondents. The respondents are not liable to contribute to the support of the pauper. By 43 Eliz. c. 2, s. 7, the father, grandfather, mother, grandmother, and children of every poor person shall maintain such person. Five classes of relations are specified. By 4 & 5 Wm. 4, c. 76, s. 56, relief to a wife or child under sixteen shall be considered as given to the husband, father or widowed mother, as the case may be. The section, although, no doubt, relating to removeability, had the effect of relieving certain persons from their liability to maintain poor relations. Perceiving that the obligation on certain persons to maintain others would be discharged by the effect of the section, the legislature added a proviso expressly specifying those whose liability should not be discharged, but did not include children amongst them. Therefore they are discharged from liability to maintain their mother while she is married to another husband, perhaps because her interest in them is likely to be transferred to him and a second family. It is said that s. 56 relates to removal, but the proviso certainly deals with maintenance, and, moreover, cannot be restricted to the first part of the section inasmuch as it specifies persons not mentioned therein, viz., grandfathers and grandmothers. *Reg.* v. *St. Mary, Islington* (1) and *Reg.* v. *Shavington-cum-Gresty* (2) are not authorities as to the construction of the proviso.

(1) 31 L. J. (M.C.) 233. (2) 20 L. J. (M.C.) 194. (3) Page 196.

1887

ARROWSMITH v. DICKENSON.

The relief in the present case was given to the husband, whom the respondents are not bound to maintain.

WILLS, J. I am of opinion that this appeal must succeed. The facts are that a woman unable to maintain herself had children who were called upon to fulfil their obligation under the statute of Elizabeth, and to relieve and maintain their mother. Their answer is that she has married a second husband, who is now in receipt of parochial relief. The obligation under 43 Eliz. s. 2, is positive and plain, and, although in form the children are required to pay to the parish officers the sums to which the children may be assessed for the maintenance of their parents, that is not the substance of the enactment. The object is not to reimburse the parish officers sums paid by them out of the rates for the maintenance of the parent, but to prevent poor persons becoming chargeable on the rates at all by imposing on children the obligation of themselves maintaining their parents who are destitute. The way in which the obligation shall be carried into effect is to be determined by the magistrates, but this is only the machinery; the underlying duty is to maintain the parents.

But it is said that this legislation is displaced by an Act the object of which was to prevent families being broken up and children being removed to one place and their parents to another, because there is a proviso which possibly does not cover all the ground over which it should go to make the section a complete and harmonious whole. I agree that there is that defect. But the question is whether that proviso is really wanted to limit the proper operation of the clause itself. If the clause itself has the meaning attributed to it, then the proviso is not wanted, and affords an instance of what frequently and naturally happens in Acts of Parliament, viz. that provisoes are inserted ex majori cautelâ to prevent questions arising which may possibly never arise. It is a strange method of construing an Act to look at the proviso first in order to construe the preceding words of the section. The proper mode is to read the section first and then the proviso. 4 & 5 Wm. 4, c. 76, s. 56, enacts only that *if* parish relief is given to the wife it shall be deemed to be given to the husband. But, as I have pointed out, the very object of the

legislature was to prevent parochial relief being given to persons by enforcing the natural obligation on children to maintain the parent, and the fact that the method of enforcing the obligation generally adopted is for the parish to find money or food and be reimbursed by the person liable to maintain the parent certainly does not transform into parochial relief that which in its nature is not so. Suppose parish relief, properly so called, given to the wife "be considered as given to her husband," whatever bearing or operation that may have on the question of settlement or otherwise, how can that relieve the children from the obligation to maintain their mother? It is unnecessary to consider the precise effect of the proviso on the preceding words, but if I do consider it I have no doubt that it is an instance common enough of a proviso put in simply from precaution. It seems to me that it does not affect the operation of the previous part of the section, but I will go further and say that, even if it did, the enactment in s. 56 does not affect the liability under the statute of Elizabeth.

GRANTHAM, J. I am of the same opinion. I should be sorry to have to come to any conclusion that would relieve children from the responsibility of maintaining their parents which is imposed by law as well as by nature. The law of England is made clear by the statute of Elizabeth and has never been altered with respect to that liability. I agree with my brother Wills that the object of 4 & 5 Wm. 4, c. 76, s. 56, was to remedy the effect on status of various decisions as to the consequence of relief given to persons enumerated in the Acts. Therefore it was found necessary to insert those words in the section to prevent the status of the persons specified being affected by relief given to others and not to them individually. The proviso necessarily refers to certain exceptions and not to all.

Case remitted accordingly.

Solicitor for appellant: *Fletcher, Northwich.*

Solicitor for respondents: *John Burton, for Thomas Cooper, Congleton.*

J. R.

1887
Dec. 16.

[IN THE COURT OF APPEAL.]

IN RE AYLMER. EX PARTE BISCHOFFSHEIM.

Bankruptcy—Scheme of Arrangement—Approval of Court—Consent by Debtor that Trustee shall enter Judgment against him for full Amount of Debts to be enforceable as in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28, *sub-s.* 6.

The provisions of sub-s. 6 of s. 28 of the Bankruptcy Act, 1883, cannot, by agreement between a debtor and his creditors, be incorporated into a scheme of arrangement of the debtor's affairs under s. 18, nor can a jurisdiction, similar to that which is conferred on the Court by sub-s. 6 in the case of a bankruptcy, be given to the Court by agreement between the debtor and his creditors in the case of a scheme of arrangement.

A scheme of arrangement of a debtor's affairs, accepted by his creditors under s. 18, provided that the debtor should, prior to the approval of the scheme, consent to judgment being entered against him by the trustee under the scheme for the full amount of the debts provable thereunder, such judgment to have the same effect, and to be enforceable in the like manner and to the like extent, as though the debtor had been adjudged bankrupt under the proceedings, and the Court had granted him an order of discharge conditional upon his consenting to judgment being entered against him by the trustee, and such judgment had been entered accordingly :—

Held, that, as the judgment could not be enforced either at common law, or under the Act, or by agreement, the scheme, so far as it purported to give the judgment, was illusory and of no effect, and that it ought not to be approved by the Court.

APPEAL by the debtor against the refusal of a registrar to approve of a scheme of arrangement of the debtor's affairs. A receiving order having been made against the debtor on the petition of a creditor, he afterwards proposed to his creditors a scheme of arrangement, which they resolved to entertain. The registrar approved of the scheme, but the Court of Appeal reversed his decision. (1) Leave was afterwards given to the debtor to summon a new first meeting of his creditors. The new meeting was held on August 5, 1887, when the creditors passed a special resolution, entertaining a proposal by the debtor for a scheme of arrangement which contained (amongst others) the following provisions :—

"I. (*a.*) That the property of the debtor, which would become

(1) 19 Q. B. D. 33.

divisible amongst his creditors if he were adjudged bankrupt under these proceedings, shall vest in a trustee to be appointed by the creditors under this scheme of arrangement; that such trustee shall, subject to the provisions of this scheme, administer the aforesaid property under the supervision of a committee of inspection, in the like manner and with the like powers and duties, and subject to the like conditions in all respects, so far as is consistent with the Bankruptcy Act, 1883, as though the debtor had been adjudged bankrupt and such trustee had been appointed trustee in the bankruptcy.

"(*b.*) That the debtor shall and will, prior to the approval of this scheme of arrangement, consent to judgment being entered against him by the said trustee, as soon as this scheme shall have been approved, for the full amount of the debts provable thereunder, such judgment to have the same effect, and to be enforceable in the like manner, and to the like extent, as though the debtor had been adjudged bankrupt under these proceedings, and the Court had granted him an order of discharge conditional upon his consenting to judgment being entered against him by the trustee, and such judgment had been entered accordingly: Provided always, that such judgment shall only be enforceable in respect of any balance remaining due to the said creditors after giving credit for any dividend or dividends distributed by the trustee out of the proceeds of the assets vested in him under this scheme, or out of moneys which may from time to time be paid to him by the debtor for the purpose of distribution amongst the creditors as aforesaid, or out of any securities accepted by any creditor in lieu of cash."

The resolution was confirmed at a second meeting, and the official receiver reported to the Court that the scheme was reasonable and calculated to benefit the general body of the creditors.

The debtor had prior to the report signed a document by which he consented "to judgment being entered against me by the trustee of my estate, so soon as my scheme of arrangement submitted by me to my creditors shall have been approved, for the full amount of the debts provable thereunder, such judgment to have the same effect, &c." (following the words of the resolution).

1887

IN RE AYLMER. EX PARTE BISCHOFFSHEIM.

The registrar refused to approve of the scheme, and adjudged the debtor a bankrupt.

The debtor appealed.

F. Cooper Willis, for the appellant. The scheme is a beneficial one to the creditors, and it ought to be approved. The official receiver reported in favour of it. The debtor in effect agrees to give up his future property to his creditors, and that is a benefit to them. It secures to them an advantage which they would not necessarily obtain in a bankruptcy, but only if the Court granted the bankrupt an order of discharge upon the condition that he should consent to judgment being entered against him as provided by the scheme. (1)

(1) Sect. 18 of the Bankruptcy Act, 1883, provides, sub-s. 6: "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme."

Sub-s. (10): "The provisions of a composition or scheme under this section may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court."

Sub-s. (11): "If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section any debt provable in other respects, which has been contracted before the date of the adjudication, shall be provable in the bankruptcy."

Sub-s. (12.) "If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of this Act shall apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme."

Sub-s. (13): "Part III. of this Act shall, so far as the nature of the case

1887

IN RE AYLMER. EX PARTE BISCHOFFSHEIM.

Cooper Willis, Q.C., and *Woodfall*, for the opposing creditor. The provisions relating to the consent judgment are really an attempt to incorporate the provisions of sub-s. 6 of s. 28 into a scheme under s. 18. This cannot be done: *Ex parte Whinney* (1); *Ex parte Bischoffsheim.* (2) Nor can a similar jurisdiction be given to the Court by consent of parties.

The debtor cannot give any valid consent to judgment being entered against him by the trustee until a trustee has been appointed, which cannot be done till after the scheme has been approved by the Court, and the resolution provides that the consent shall be given prior to the approval of the scheme.

F. Cooper Willis, in reply. The Court has power under sub-s. 10 of s. 18 to enforce the provisions of a composition, and this would give jurisdiction to enforce the consent judgment. The debtor could not be heard to say that the Court had no jurisdiction; it always has jurisdiction over the debtor. *Ex parte Whinney* (1) is distinguishable. In that case it was decided that a trustee under a scheme of arrangement had not a power which the Act gives to the trustee in a bankruptcy.

[Several other points were raised in argument, but, as the Court pronounced no opinion upon them, the arguments relating to them are omitted.]

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and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words 'trustee,' 'bankruptcy,' 'bankrupt,' and 'order of adjudication,' as in the last preceding sub-section."

Sect. 28 provides, by sub-s. 2, that, on the hearing of a bankrupt's application for an order of discharge, "the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property."

Sub-s. (6): "The Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts."

(1) 17 Q. B. D. 238.

(2) 19 Q. B. D. 33.

1887

IN RE AYLMER. EX PARTE BISCHOFF-SHEIM.

LORD ESHER, M.R. Many points have been raised in the argument of this case with regard to which it has become unnecessary that we should give a judicial opinion. But there is one point which seems to me to be fatal to the adoption of this scheme. The scheme proposes that the debtor shall consent to a judgment. I think that the objection which has been taken to the effect of that consent is not tenable. It is clearly an agreement that he will, as soon as the scheme of arrangement has been approved, consent to judgment being entered up by the trustee. That of course means that he will consent to all the steps being taken which are necessary in order to effect such a judgment. But the resolution is, "such judgment to have the same effect, and to be enforceable in the like manner and to the like extent, as though the debtor had been adjudged bankrupt under these proceedings, and the Court had granted him an order of discharge conditional upon his consenting to judgment being entered against him by the trustee, and such judgment had been entered accordingly." Now, if by that it was intended to give to the Court the power which s. 28, sub-s. 6, confers on it in the case of a bankruptcy, it is an attempt to incorporate into a scheme of arrangement under s. 18 sub-s. 6 of s. 28, and I am of opinion that that cannot be done. In *Ex parte Bischoffsheim* (1) we held that s. 27 cannot be so incorporated, neither, I am of opinion, can sub-s. 6 of s. 28. Therefore, if this is an attempt to give the Court the powers conferred by sub-s. 6 of s. 28, I think it cannot be done; that power cannot be given to the Court. If, on the other hand, it is an attempt to give to the Court a similar power resting on the consent of the parties, the well-known rule applies, that the consent of parties cannot give the Court a jurisdiction which it does not otherwise possess. The Court has not this jurisdiction under the statute, and the jurisdiction cannot be given to it by consent. This is a fatal defect in the scheme, because it makes the proposed judgment illusory and of no effect at all. It cannot be enforced at common law, because it is fettered by the provision that it is to be enforced in the manner contemplated by sub-s. 6 of s. 28, and no effect can be given to it either under the statute or by consent. It follows

(1) 19 Q. B. D. 33.

that it has no effect at all, and that the scheme, so far as the giving of the judgment is concerned, is illusory and ineffectual. For this reason the scheme cannot be allowed.

1887

IN RE AYLMER. EX PARTE BISCHOFFSHEIM.

BOWEN, L.J., and FRY, L.J., concurred.

Solicitor for debtor: *H. F. Barnett.*
Solicitors for opposing creditor: *Freshfields & Williams.*

W. L. C.

[IN THE COURT OF APPEAL.]

Dec. 14.

THE DUKE OF DEVONSHIRE AND OTHERS *v.* PATTINSON AND THE MAYOR, ALDERMEN, AND CITIZENS OF CARLISLE.

Conveyance, Construction of—Parcels—Grant of Riparian Land—Bed of River ad medium filum, Presumption that included rebuttable—Surrounding Circumstances dehors the Deed — Fishery treated as Separate Tenement—Franchise—Prerogative of Crown—Non-tidal River.

The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river usque ad medium filum should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention.

The owners of a manor by conveyances made respectively in 1767 and 1846 granted to purchasers pieces of riparian land fronting a river, the bed of which formed parcel of the manor. It was proved that, prior to the earliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; and that at the date of the conveyances in 1846 such fishery was actually under lease to tenants. The grantees under the before mentioned conveyances, and their successors in title, had, until the acts complained of in the action, never claimed or exercised any right of fishing over the bed of the river by virtue of any right of soil or otherwise, but the owners of the manor or their tenants of the fishery had always fished without interruption:—

Held, that under the circumstances the conveyances ought not to be construed as passing any portion of the bed of the river to the grantees.

Quære, whether the Crown ever could have as part of its prerogative an exclusive right of fishing in a non-tidal river flowing over the soil of a subject; and whether, if the Crown could have such right, it could be granted to a subject as a franchise.

APPEAL from the judgment of A. L. Smith, J., on further consideration in favour of the plaintiffs.

1887

DUKE OF DEVONSHIRE v. PATTINSON.

The details of the case as proved at the trial sufficiently appear from the judgment, but, so far as is necessary for the purpose of making the arguments intelligible, the facts may be briefly stated as follows:—

The plaintiff, the Duke of Devonshire, who claimed as lord of the Manor of the Socage of the Castle of Carlisle a several and exclusive fishery in a portion of the River Eden, the other plaintiffs being his lessees of the fishery, sued the defendants in respect of the alleged wrongful acts of the defendant Pattinson, who, by the authority of the defendant corporation, had fished at a place within the limits of the fishery claimed by the plaintiffs. The defendant corporation claimed that certain portions of the bed of the river over which the plaintiffs' claim of a fishery extended, and which included the place where Pattinson had fished, were their freehold, and they denied that the plaintiffs had any title to a fishery as claimed therein. The river at the locality in question is neither tidal nor navigable.

A very large quantity of evidence, documentary as well as oral, was adduced with regard to the manor and fishery, the documentary evidence going back as far as the time of Edward I., the details of which it is unnecessary to give. The history of the title to the manor, so far as material, appears from the judgment; it is sufficient here to say that it had become vested in the Crown prior to the year 1629, and by conveyance from the Crown was granted to the Duke of Portland. In 1787, the then Duke of Portland conveyed it to the then Duke of Devonshire, the predecessor in title of the plaintiff. It will be seen from the judgment that the Court were satisfied that the evidence in effect shewed that the Duke of Devonshire and his predecessors in title as owners of the manor had exercised the exclusive right of fishery over the parts of the river in dispute from as far back as living memory went down to the time of the acts complained of; that, so far as the ancient documentary evidence was concerned, the fishery, which was traced back in a series of rentals produced as far as 1702, must be considered to have been a fishery of the same extent and kind as that actually enjoyed by the Dukes of Devonshire during the time of living memory: and that the proper inference to be drawn from the facts was that the bed of

the river at the locality in question was parcel of the manor, the soil with the fishery in the water flowing over the same having belonged to the owners thereof.

The title set up by the defendant corporation, so far as material to this report, depended on three conveyances respectively made by the owners of the manor, one in 1767 and two in 1846, by which certain riparian closes of land called respectively the Hole Meadow, Castle Saucery, and Low or Far Saucery, were conveyed to the corporation or their predecessors in title, the land conveyed in each case being described as bounded on one side by the River Eden. The defendants' contention was that the effect of these conveyances was to pass the bed of the river fronting the land conveyed usque ad medium filum to the grantees, together with all territorial rights over the same possessed by the respective grantors, and that, inasmuch as the grantors were the owners of the bed of the river at the time of the conveyances, there could not be any incorporeal right of fishery in them, none such being reserved by the conveyances. At the time when the conveyances of 1846 were made the fishery was actually under lease to tenants. It was not shewn whether at the date of the conveyance of 1767 the fishery was let or in hand, but it was shewn to have been for a very long period previously treated as a hereditament distinct from the riparian land, it having been let from time to time for many years to tenants. It was proved, as will be seen from the judgment, to the satisfaction of the Court that the grantees under such conveyances and their successors in title had never down to the time of the acts complained of claimed or exercised any right of fishing over the bed of the river opposite the respective closes conveyed either by virtue of any right of soil or otherwise.

The learned judge held in effect that the proper inference from the evidence and facts proved was that a several and exclusive fishery over a portion of the river had in former times been created by grant from the Crown of a franchise by virtue of the royal prerogative, which formed a part of the possessions of the manor distinct from the ownership of the soil, and that this fishery was still vested in the Duke of Devonshire as owner of the manor, and was not affected by the before mentioned conveyances. He therefore gave judgment for the plaintiffs.

1887

DUKE OF DEVONSHIRE v. PATTINSON.

Nov. 10, 11, 12, 13, 15, 16. *Ambrose, Q.C.*, and *E. Page* (*Sutton*, with them), for the defendants. There could not be a franchise fishery in a non-tidal river. The sovereign never could, as a matter of prerogative, create a fishery in alieno solo; if the sovereign was the owner of the bed of a non-tidal river, he would as such owner possess the right of fishing, but his right in that respect would be, like that of any other owner, a territorial right, not a branch of the prerogative. All the instances of free fisheries in the sense of franchise fisheries to be found in the books are cases where the fishery was in public or tidal waters, and the soil therefore belonged to the Crown. There is no mention anywhere in the books of a franchise fishery granted by the Crown as a branch of the prerogative over the soil of a subject.

[FRY, L.J. The franchise of free warren or chase might formerly have been granted over land not belonging to the sovereign.]

That was by virtue of the peculiar doctrine of the common law as to beasts of the chase and game.

[BOWEN, L.J. There was a doctrine which is frequently mentioned in the books that the sovereign had a special right in respect of game. Blackstone says that the right to take game everywhere in the country belonged to the sovereign. (1)]

There were no doubt special enactments and prerogatives of the King with regard to forests, chases and warrens. A man could not make a warren in his own land without license from the King. Quo warranto would lie in such a case. But there is no authority to shew that in the case of fish or fisheries there were any doctrines similar to those which prevailed with regard to game and beasts of the case.

The passages in Hale de Jure Maris, Hargrave's Law Tracts, p. 7, concerning the interest of the King in fresh-water rivers, and the forms of writs there given, do not afford any ground for supposing that the King had at any time the right of creating a franchise fishery in private, i.e., non-tidal rivers. It may be doubtful whether the King's right to put a river in defence there mentioned applied to any but a navigable river (which the Eden in this locality is not), for the other prerogatives of the King

(1) See Blackstone's Commentaries, 16th ed., by Coleridge, vol. ii. p. 402; vol. iv. pp. 174, 415.

mentioned in the same chapter all seem applicable to fresh navigable rivers. But assuming that the interest of the King there mentioned applied to non-navigable rivers, it seems to have been in the nature of a personal privilege of pleasure or recreation; and there seems to be nothing to shew that there was any interest which the King could assign so as to create a franchise in the hands of a subject. In many of the text-books and treatises on the subject of the prerogative lists are given of the royal prerogatives, but nowhere is there any mention of the power to create a franchise of fishery in a private river.

[They cited on this point 1 Stephen's Blackstone, pp. 687, 688, 8th ed.; Coke Inst. 4th Part. cap. 73, p. 318; Hall on the Sea-shore, p. 14; 3 Cruise's Digest, title 27, pp. 244, 262; Bacon's Abridgment, title Prerogative, p. 396; Chitty on Prerogatives of the Crown, p. 142; Co. Inst. on Stat. Westminster 2nd, c. 47, 2nd Part, 477; *Sury* v. *Pigot* (1); Tudor's L. C. on Real Property, 3rd ed. at pp. 154, 162; *Holford* v. *Bailey* (2); *Bristow* v. *Cormican* (3); *Marshall* v. *Ulleswater Steam Navigation Co.* (4); *River Banne Case* (5); *Carter* v. *Murcot.* (6)]

Putting aside the notion of a franchise fishery, the fishery could only exist either as a mere territorial right ratione soli, or as an incorporeal hereditament granted or reserved out of the ownership in fee simple of the soil. The predecessors in title of the Duke were owners of the soil, and, therefore, an incorporeal right of fishery, if any, not being a franchise, would merge, and the fishery exercised by the owners would be merely a territorial right by virtue of ownership of the bed of the river. Then it is contended that the bed of the river usque ad medium filum at the localities in question, together with all territorial rights, has passed to the corporation by virtue of the conveyances of riparian lands from the owners of the manor to the corporation, and their predecessors in title: *Wheeldon* v. *Burrows.* (7) The rule of construction, by which, where land is described in a conveyance as bounded by a river, the land conveyed is presumed to extend

(1) Poph. 166, at p. 170.
(2) 13 Q. B. 426.
(3) 3 App. Cas. 641.
(4) 3 B. & S. 742.
(5) Davies, 149, at p. 155.
(6) 4 Burr. 2163.
(7) 12 Ch. D. 31.

1887

DUKE OF DEVONSHIRE v. PATTINSON.

usque ad medium filum, cannot be rebutted by mere subsequent user or other matters entirely extraneous to the deed; for that would really be to contradict the meaning of the words of the instrument according to the usual rule of construction. The words of the deed having a clear legal meaning, surrounding circumstances and subsequent user cannot be regarded. There is nothing here in the words of the deeds themselves to rebut the ordinary presumption.

[They cited on this point *Berridge* v. *Ward* (1); *Crossley* v. *Lightowler* (2); *Marquis of Salisbury* v. *Great Northern Ry Co* (3); *Lord* v. *Commissioners of Sydney*. (4)]

Littler, *Q.C.*, and *Stuart A. Moore* (*W. H. Squire*, with them), for the plaintiffs. The plaintiffs contend that the proper inference from the evidence is that the fishery, i.e., the bed of the river with the rights attached thereto, in the part of the Eden now in question, was parcel of the manor as originally created, and that it was always treated as one separate and distinct hereditament forming part of the manor apart from the riparian closes and lands within the manor. It was what has been called unum quid, see the judgment of Lord Selborne in *Neill* v. *Duke of Devonshire*. (5) The documentary evidence from the earliest times shews this: it shews that the fishery had been from time to time leased as a separate hereditament long prior to the earliest of the conveyances, viz., that of 1767, and it was proved to have been actually under lease to tenants at the time of the conveyances of 1846. Under these circumstances the ordinary presumption that the conveyance of the riparian land conveys the bed of the river usque ad medium filum is wholly inapplicable. It is clear that the ordinary presumption may be rebutted by proof of surrounding circumstances inconsistent with it. (6)

[They also cited, in addition to cases referred to in the judgment, *Foster* v. *Wright* (7); *Malcolmson* v. *O'Dea*. (8)]

(1) 10 C. B. (N.S.) 400.
(2) Law Rep. 3 Eq. 279.
(3) 5 C. B. (N.S.) 174.
(4) 12 Moo. P. C. 473.
(5) 8 App. Cas. 135, at p. 151.
(6) The counsel for the plaintiffs did not argue much in support of the view that the fishery was a franchise fishery, as the Court intimated that they were in their favour on the other points.
(7) 4 C. P. D. 438.
(8) 10 H. L. C. 593.

Ambrose, Q.C., in reply. (1)

Cur. adv. vult.

Dec. 14. The judgment of the Court (Lord Esher, M.R. and Bowen and Fry, L.JJ.) was delivered by

FRY, L.J. The plaintiffs in this action sue the corporation of Carlisle and one Pattinson for a trespass on the plaintiffs' fishery in the river Eden, committed by the defendant Pattinson under the authority of the defendants, the corporation. The action has by the conduct of both parties been treated as one not only to determine the question of trespass, or no trespass, at the particular spot where Pattinson fished, but to ascertain the rights of the respective parties in the river Eden, in the locality in question.

The plaintiff, the Duke, claims a fishery in the locus in quo, as lord of the Manor of the Socage of the Castle of Carlisle; the defendants, the corporation, defend as riparian owners. The Eden, throughout the stretch in controversy, is neither tidal nor navigable.

The question really is whether the plaintiff, the Duke, has proved his title to the fishery claimed, and this sub-divides itself into two points—the first as to the user in the river, and the second whether, if there be an ancient user proved, any legal origin can be found for it consistently with the facts in evidence.

In order to make intelligible our conclusions on these questions, it will be necessary to state briefly the devolution of the manor and the title of the defendants as riparian owners.

Before the year 1629 the manor in question appears to have been parcel of the possessions of the Crown of England, and in that year it was granted by King Charles I. to the Earl of Holland and others as trustees for Queen Henrietta Maria for a term of ninety-nine years. In 1672 these trustees conveyed the term to trustees for the benefit of Catherine, the queen of Charles II. In 1678 Queen Catherine demised the manor to the Earl of

(1) It should perhaps be stated that the arguments, which extended over several days, involving the discussion of the effect of a great mass of ancient documentary evidence, raised various points not here mentioned, only so much of the arguments being given as is material to the points dealt with by the parts of the judgment which are here reported.

1887

DUKE OF DEVONSHIRE v. PATTINSON.

FRY, L.J.

Carlisle. In 1696 King William III. granted the reversion expectant on the term of ninety-nine years to the Duke of Portland. In 1728 the ninety-nine years' term expired, and thereupon the Duke of Portland entered into receipt of the rents and profits of the manor. In 1787 the Duke of Portland conveyed the manor to the then Duke of Devonshire, from whom the present Duke claims title.

The defendants, the corporation, are riparian owners of the following properties derived from the Duke or his predecessors in title: Low Sands and Willowholme conveyed by the Duke to the corporation in 1826 and 1885 respectively, with express reservations of the fishery; Hole Meadow and Low Saucery conveyed by the Dukes of Portland and Devonshire to the corporation in 1767 and 1846 respectively (the deeds being silent as to the fishery); Castle Saucery conveyed by the Duke of Devonshire to Messrs. Dixon in 1846 (the conveyance being silent as to the fishery) and conveyed by Messrs. Dixon to the corporation in 1871.

The corporation are also the owners of three other riparian properties, Stonyholm, Etterby Wath, and Lowry Holme, purchased in the years 1705, 1707 and 1860, respectively from owners not deriving title from the Duke. Stonyholme is east of and outside the manor. All the other properties lie within the manor of the socage.

Upon the question of user we have nothing to add to the opinion we expressed at the end of the appellants' argument. In the course of his judgment, A. L. Smith, J., observed, "It was proved, and indeed there was no evidence to the contrary, that as far as living memory went the Dukes of Devonshire had by their tenants continuously fished with nets, when and as they pleased throughout, and over the whole of the stretch of water now claimed by the plaintiff, and that such tenants had taken the fish therein caught, and annually paid the stipulated rent for the same. It was also equally established that during that period no riparian owner had ever set up, or attempted to set up any claim or right whatever to fish in the fishery now in question." If this sentence be qualified as the learned judge himself subsequently qualified it, as to the extent of the stretch of

water (1), we are of the same opinion as the learned judge, and we agree with him that it is just and reasonable to hold that the fishery which is traced in the rentals before us, back to the year 1702, must be considered to be a fishery of the same extent and kind as the fishery which has been exercised by the Duke and his tenants within the period of living memory.

Such having been the ancient and modern user of the fishery, it is plainly incumbent on the Court to find a legal origin for it, if such can be found. The defendants say that no such legal origin can be found.

A. L. Smith, J., has come to the conclusion that the fishery enjoyed by the Duke and his predecessors in title is to be regarded as a franchise, i.e., a right in the hands of a subject derived by a grant from the Crown of a prerogative. If the Crown were both owner of the bed of the river and of the right of fishing, it is obvious that the right of fishing would be a proprietary and not a prerogative right, and consequently the view of the learned judge gives rise to the inquiry whether the Crown could, as part of its prerogative, have an exclusive right of fishing in the water flowing over the soil of a subject; and, secondly, whether such a right could be granted to a subject so as to be a franchise in his hands.

The 2nd chapter of the first part of Hale's Treatise De Jure Maris, and the forms of writ there given in relation to the defence of rivers, appear to us to establish that prior to the Great Charter of Henry III., the King had exercised as part of his prerogative a right to cause various rivers, including fresh rivers above the flow of the tide, to be put in defence, i.e., to be kept close, in anticipation of a visit of the King for the purpose of fishing the river, and further that he required certain men, who were anciently liable to perform the duty, to make preparations for his arrival by the construction of bridges; that this prerogative was exercised by means of a writ addressed to the sheriff requiring him to put the river in defence; and that after Magna Charta

(1) The learned judge decided against the plaintiffs as to a portion of the stretch in which they claimed a fishery, and as to this there was a cross appeal, but as the question involved was purely one of fact, the facts and arguments and portion of the judgment which related to this cross appeal are omitted.

1887

DUKE OF DEVONSHIRE v. PATTINSON.

FRY, L.J.

the prerogative was still exercised, but only in regard to rivers which had been put in defence in the reign of Henry II.

But assuming this prerogative to have existed, we entertain serious doubts on the following questions: first, whether the prerogative would have authorized the King to close the river against the owner of the soil, or to assert any right in the river, except in preparation for a royal visit; second, whether the prerogative was not of a purely personal character existing only for the pleasure of the King and his Court, and consequently whether the prerogative could be granted by the King so as to become a franchise in the hands of a subject; and thirdly, if it could be held by a subject as a franchise, whether it would confer on the subject a permanent right to fish to the continual exclusion of the owner of the soil. The case of the King's prerogative of Saltpetre, 12 Reports, page 12, shews that the prerogative of purveyance, being vested in the Crown for the purposes of defence, cannot be granted or transferred to any other; and it is possible that the prerogative of putting rivers in defence may have existed for the royal pleasure only, and so could not be granted to a subject. No authority has been cited or come to our knowledge which tends to dispel the doubts we have stated; moreover it does not appear that in any one of the numerous cases with regard to fisheries to be found in the books, a right to an exclusive fishery has been maintained either by proof or presumption of the existence of such a franchise as that in question. For these reasons, we feel a hesitation in adopting the view entertained by the learned judge.

In our opinion, the true conclusion to be drawn from the user, and the documentary evidence, is that in 1629, when King Charles I. granted the Manor of the Socage to trustees for his queen, and again in 1696, when King William III. granted the reversion expectant on this term to the Duke of Portland, the river-bed throughout the manor and the fishery in the river flowing over the same were parcel of the Manor of the Socage, that they passed as such to the grantees of the Crown, and that the enjoyment of the fishery by the Earl of Carlisle, and by the Dukes of Portland and Devonshire, down to the present time, is attributable to this title.

The defendants have argued that, if the fishery and the bed of the river were parcel of the manor and vested as such in the Duke, they have acquired the rights of the Duke to the middle of the stream under the respective conveyances of Hole Meadow, in 1767, and of Castle Saucery and Low Saucery in 1846.

It will be convenient to consider the defendants' argument in the first place in its application to one of the more recent deeds. By the deed of March 21, 1846, the Duke conveyed to Messrs. Dixon the Castle Saucery, described as a close bounded by the River Eden on or towards the north, and the deed contained the usual general words. The defendants rightly contend that to such a deed as this, containing such a description of a close, there applies the well known presumption that, although the close is described as bounded by the river, yet that the grant carries with it a moiety of the bed of the river, and they have further contended that this presumption can be repelled only by words in the deed itself. In our opinion, this latter contention cannot be maintained, for we hold that the presumption may equally be rebutted by the circumstances under which the deed was executed. It is not necessary to refer in detail to the cases of *Beckett* v. *Corporation of Leeds* (1), or *Marquis of Salisbury* v. *Great Northern Ry. Co.* (2), and the very recent case of *Micklethwaite* v. *Newlay Bridge Co.* (3) The conclusion that you may regard the circumstances under which a deed is executed as rebutting the presumption is only an illustration of a wider principle. "In deeds as well as in wills," said Lord Wensleydale in *Waterpark* v. *Fennell* (4), "the state of the subject at the time of execution may be inquired into." So again there is a presumption that a demise of land described by superficial metes and bounds carries with it the land to the centre of the earth: but this presumption has been rebutted by considering the state of circumstances at the date of the grant, and finding that the lessor has previously demised a cellar to a third person, who was in occupation under that lease at the date of the lease of the surface: *Doe* d. *Freeland* v. *Burt.* (5) There is, in our opinion, no

(1) Law Rep. 7 Ch. 421.
(2) 5 C. B. (N.S.) 174.
(3) 33 Ch. D. 133.
(4) 7 H. L. C. 684.
(5) 1 T. R. 701.

1887

DUKE OF DEVONSHIRE v. PATTINSON.

FRY, L.J.

doubt that in the grant of a set of chambers in our Inns of Court, a flat in a house constructed in flats, or of a seam of coal in the earth, the presumption that the grant extended infinitely upwards and downwards would be repelled by the nature of the subject matter of the grant, and without any express words in the conveyance.

What, then, were the circumstances surrounding the grant made by the Duke of the Castle Saucery in 1846? At that date the fishery throughout the reach of the Eden now in question was in the tenancy of one George Relph, who was a partner in or trustee for a company; it had been in that tenancy for some thirteen years, and the company and their servants had openly, with boats and nets, fished the river. Looking at the usage under this deed (as we are bound to do in the construction of a deed now several years old) we find that from its date down to immediately before this action, neither the grantees under the deed of 1846, nor the corporation as their assigns, ever fished the stream by virtue of any right of soil or otherwise. These circumstances seem to us strong to shew that the Duke did not by the deed in question intend to grant a right in the river inconsistent with his previous demise to Relph, and consequently are sufficient to rebut the presumption which would have given half the bed of the river to the grantees of the Duke.

With regard to the deed by which the Duke granted the Far Saucery to the corporation in 1846, and which bears the same date as the conveyance of Castle Saucery to Messrs. Dixon, all the observations just made with regard to that deed apply.

With regard to the conveyance by the Duke of Portland to the corporation of the Hole Meadow in 1767, similar observations apply, so far as the facts of the case are or can be in evidence. We do not know whether the fishery was at that date in the hands of the Duke or of a tenant; but we know that for many years previous it had been let as a fishery, and we feel bound to presume that the modern user, which has been proved with regard to the fishery, existed in 1767, that the fishery was then as now known and treated as a tenement distinct from the closes adjoining the river: and the fact that the corporation had never, for more than a century after the grant of 1767, set up any

1887

DUKE OF DEVONSHIRE v. PATTINSON.

FRY, L.J.

title to fish under this deed, or exercised any such right, is a strong confirmation of our conclusion. "All ancient documents," as was rightly said by Lord Wensleydale in *Duke of Beaufort* v. *Mayor of Swansea* (1), "where a question arises as to what passed by a particular grant, can be explained by modern usage."

We conclude, therefore, that under none of the grants from the Duke of riparian lands now held by the corporation did any interest in the bed of the river pass.

We hold, for the foregoing reasons, that the judgment of A. L. Smith, J., was right in the conclusions at which he arrived, and the appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Currey, Holland & Currey.*
Solicitors for defendants: *James & James, for Nanson.*

E. L.

[IN THE COURT OF APPEAL.]

Dec. 1, 2.

MERIVALE *v.* CARSON.

Libel—Newspaper Criticism of Stage Play—Question to be left to Jury—"Fair Criticism"—Privilege.

Where an action of libel is brought in respect of a comment on a matter of public interest the case is not one of privilege, properly so called, and it is not necessary in order to give a cause of action that actual malice on the part of the defendant should be proved. The question whether the comment is or is not actionable depends upon whether in the opinion of the jury it goes beyond the limits of fair criticism.

Campbell v. *Spottiswoode* (3 B. & S. 769) approved and followed.

Henwood v. *Harrison* (L. R. 7 C. P. 606) dissented from.

APPEAL by the defendant against the refusal of a Divisional Court (Mathew and Grantham, JJ.) to allow a new trial of the action, or to enter judgment for the defendant.

The action was brought to recover damages in respect of an alleged libel. At the trial before Field, J., it appeared that the plaintiff and his wife were the joint authors of a play called "The Whip Hand." The defendant was the editor of a theatrical

(1) 3 Ex. 425.

1887

MERIVALE v. CARSON.

newspaper called *The Stage*. Early in May, 1886, the play was performed at a theatre in Liverpool. On May 7 a criticism of the play was published in the defendant's newspaper. The part of the article charged in the statement of claim as libellous was as follows:—"'The Whip Hand,' the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used ad nauseam, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-marker or stable-lout. And so the Marquis Colonna in 'The Whip Hand' is offered up by the authors upon the altar of tradition and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier." The innuendo suggested was that the article implied that the play was of an immoral tendency.

It was admitted that there was no adulterous wife in the play.

Field, J., in the course of his summing-up to the jury said: "The question is, first, whether this criticism bears the meaning which the plaintiffs put upon it. If it is a fair temperate criticism, and does not bear that meaning, or is not fairly to be read as having that meaning, then your verdict will be for the defendants. . . . . It is not for a moment suggested by any one that the defendant is animated by the smallest possible malice towards the plaintiffs. There is no ground for saying so, and no one has said so. . . . . The malice which is necessary in this action is one, which, if it existed at all, will be because the defendant has exceeded his right of criticism upon the play. You have the play before you, you must judge for yourselves. If it is no more

than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendant. It is for the plaintiffs to make out their case. They have to satisfy you that it is more than that, otherwise they cannot complain. If you are satisfied upon the evidence that it is more than that, then you will give your verdict for the plaintiffs."

The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgment for the plaintiffs accordingly, and declined to deprive them of costs.

The defendant appealed.

Cock, Q.C., and *W. Blake Odgers*, for the defendant. This being a criticism upon a matter of public interest, the occasion was privileged, and the plaintiffs were bound to prove express malice, and this they did not do: *Henwood* v. *Harrison* (1). At first sight *Campbell* v. *Spottiswoode* (2) may appear opposed to this view, but the judgments in that case must be read with reference to the facts of the case, and there the criticism was not confined to the work itself, but contained an attack on the character of the author.

Even if the article bears the meaning which the plaintiffs attribute to it, it is not libellous provided that it is a bonâ fide expression of the writer's opinion: *Hibbs* v. *Wilkinson* (3); *Eastwood* v. *Holmes* (4); *Turnbull* v. *Bird* (5); *Carr* v. *Hood* (6); *Strauss* v. *Francis* (7); *Paris* v. *Levy* (8); *Thompson* v. *Shackell* (9); *Soane* v. *Knight* (10); *Dibdin* v. *Swan.* (11)

A criticism of a play is not "unfair" unless it is dishonest. An outrageous or violent criticism might be evidence of express malice, and in that case the criticism would not be honest. The question of malice was not properly left to the jury. There is no attack on the character of the plaintiffs.

Lockwood, Q.C., and *Boxall*, for the plaintiffs. The question which Field, J., left to the jury, was, whether the defendant had

(1) Law Rep. 7 C. P. 606.
(2) 3 B. & S. 769.
(3) 1 F. & F. 608.
(4) 1 F. & F. 347.
(5) 2 F. & F. 508.
(6) 1 Camp. 355, n.
(7) 4 F. & F. 939.
(8) 9 C. B. (N.S.) 342.
(9) 1 Mood. & M. 187.
(10) 1 Mood. & M. 74.
(11) 1 Esp. 28.

1887

MERIVALE v. CARSON.

exceeded his right of fair criticism on the play. This is the question which has always been left to the jury in such cases: *Dibdin* v. *Swan* (1); *Thompson* v. *Shackell* (2); *Hibbs* v. *Wilkinson* (3); *Turnbull* v. *Bird* (4); *Campbell* v. *Spottiswoode.* (5) The question is whether the limits of "fair discussion" have been exceeded. The word "fair" has sometimes been used in conjunction with "temperate" and "honest."

[BOWEN, L.J.:—I believe the nearest approximation to a definition of "fair" is in *Macleod* v. *Wakley.* (6)

The fullest definition of "fair" is given in *Wason* v. *Walter.* (7) In *Henwood* v. *Harrison* (8) the privilege of the defendant was of a much higher nature than that of a critic of a play. The defendant had a duty to perform. Here the finding of the jury was in effect that the criticism was not fair, temperate, or honest. All those questions are for the jury. Any matter of public interest may be made the subject of fair and bonâ fide discussion in a public newspaper: *Davis* v. *Duncan.* (9) But the criticism must be expressed within the bounds of moderation and reason. If it is not, it is a libel, and the question whether it is so expressed must be decided by reasonable men.

The question of malice was withdrawn from the jury.

Odgers, in reply. In the case of a newspaper comment upon a play "fair" is equivalent to bonâ fide. So long as the writer confines his comments to the work, and does not attack the character of the author, the expression of his honest opinion cannot be a libel. There can be only two limits of legitimate criticism; a limit arising out of the matter criticised, and a limit arising out of the mind of the critic. It is not necessary that the critic's opinion should have been formed on reasonable grounds. If the jury found that the expressions used were so strong that no reasonable man could have used them, that would amount to a finding of express malice. The jury were not told by the judge that it was a question for them whether the language used was such that no reasonable man could have used it.

(1) 1 Esp. 28.
(2) 1 Mood. & M. 187.
(3) 1 F. & F. 608.
(4) 2 F. & F. 508.
(5) 3 B. & S. 769; 3 F. & F. 421.
(6) 3 C. & P. 311.
(7) Law Rep. 4 Q. B. 73, at p. 96.
(8) Law Rep. 7 C. P. 606.
(9) Law Rep. 9 C. P. 396.

1887

MERIVALE v. CARSON.

LORD ESHER, M.R. This action is brought in respect of an alleged libel contained in a criticism by the defendant upon a play written by the plaintiffs. The first thing to be considered is, what are the questions which in such a case ought to be left to the jury. The first question to be left to them is, what is the meaning of the alleged libel? The jury must look at the criticism, and say what in their opinion any reasonable man would understand by it. I am not prepared to say that in coming to their conclusion they would not also have to look at the work criticised. That, however, is not very material for us to consider now. The proper question was put to the jury in the present case. Two interpretations of the defendant's article were placed before them. One was that it meant that the play is founded upon adultery, without containing any stigma on the fact that it is so founded. The defendant's article is alleged to be libellous in that it attributed to the plaintiffs that they had written a play founded upon adultery, without any objection to it on their part, in other words, that they had written an immoral play. On behalf of the defendant it was said that the article had no such meaning, that the expression "naughty wife" does not mean "adulterous wife." It would not have that meaning in every case, but the question is whether, looking at the context of the article, it has that meaning. If the Court should come to the conclusion that the expression could not by any reasonable man be thought to have that meaning, they could overrule the verdict of the jury; otherwise the question is for the jury.

What is the next question to be put to the jury? Are they to be told that the criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant, unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in *Campbell* v. *Spottiswoode* (1), which has never been overruled. All the judges, both before and ever since that case, have acted upon the view there expressed, that a criticism upon a written published work is not a privileged occasion. Blackburn, J., in his judgment,

(1) 3 B. & S. 769.

1887

MERIVALE v. CARSON.

Lord Esher, M.R.

shews why it is not a privileged occasion. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of a criticism upon a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged. Therefore the second question to be put to the jury is, whether the alleged libel is or is not a libel. The form in which that question should be put is, I think, best expressed by Crompton, J., in *Campbell* v. *Spottiswoode*. (1) He says: "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in Courts of Justice, or in Parliament, or the publication of a scheme, or a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits, and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think, because he has a bonâ fide belief that he is publishing what is true, that is any answer to an action for libel." He says that upon the answer to the question there stated it depends whether the article upon which the action is brought is or is not a libel. The question is not whether the article is privileged, but whether it is a libel. What is the meaning of a "fair comment"? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the

(1) 3 B. & S. at p. 778.

circumstances of the particular case. I think the right question was really left by Field, J., to the jury in the present case. No doubt you can find in the course of his summing-up some phrases which, if taken alone, may seem to limit too much the question put to the jury. But, when you look at the summing-up as a whole, I think it comes in substance to the final question which was put by the judge to the jury: "If it is no more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendants." He gives a very wide limit, and, I think, rightly. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all. I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, viz. that the plaintiffs had written an obscene play, and no fair man could have said that. There was therefore a complete misdescription of the plaintiffs' work, and the inevitable conclusion was that an imputation was cast upon the characters of the authors. Even if I had thought that the right direction had not been given to the jury, I should have declined to grant a new trial, for the same verdict must inevitably have been found if the jury had been rightly directed.

Another point which has been discussed is this. It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shewn that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer

1887

MERIVALE v. CARSON.

would not be that of a critic, but he would be actuated by an intention to injure the author.

In my opinion this appeal must be dismissed.

BOWEN, L.J. We must begin with asking ourselves, what is the true meaning of the words used in the alleged libel? We have the benefit of the machinery which the law gives—the verdict of a jury—for ascertaining the meaning, and it must now be taken to have been conclusively settled, that the writer of the criticism has imputed to the plaintiffs that the story of their play turns in its main incident upon an adulterous wife, and in such a way as not to lead any one to suppose that the plaintiffs objected to the adultery, but, on the contrary, that they had treated the adultery as a spicy incident in the play without expressing any opinion as to its morality. It has been admitted by the defendant that the play does not in fact contain any adulterous wife, that there is no incident of adultery in it, and therefore it is not open to the suggestion that the plaintiffs have treated adultery lightly in such a way as to tend to immorality. These are the facts.

What then is the law applicable to them? We must see, first, what is the question which ought to have been left to the jury on this assumption of the meaning of the article, and then whether it was in fact left to them, and whether there was any miscarriage on their part. I take precisely the same view as the Master of the Rolls with regard to the way in which the word "privilege" ought to be used. The present case is not, strictly speaking, one of "privileged occasion." In a legal sense that term is used with reference to a case in which one or more members of the public are clothed with a greater immunity than the rest. But in the present case we are dealing with a common right of public criticism which every subject of the realm equally enjoys—the right of publishing a written criticism upon a literary work which is offered to public criticism.

It is true that a different metaphysical exposition of this common right is to be found in the judgment of Willes, J., in *Henwood* v. *Harrison*. (1) That learned judge and the majority of the Court

(1) Law Rep. 7 C. P. 606.

of Common Pleas seem to have treated this right as a branch of the general law of privilege, and to have found a justification for the use of the word "privilege" in the subject-matter of the criticism, although there is no limit of the number of the persons entitled to make the criticism. With great respect to Willes, J., I agree with the Master of the Rolls that this is not so good an exposition of the right as that which is given by Blackburn, J., and Crompton, J., in *Campbell* v. *Spottiswoode*. (1) But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view was the right one. But, among other reasons, why I prefer the view of Blackburn, J., and Crompton, J., is this, that it leaves undisturbed the mode of directing the jury in cases of this class which has been ordinarily adopted, viz., to begin by asking them whether they think the limits of fair criticism have been passed. That implies that there is no libel if those limits are not passed. It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. This leaves unsettled the inquiry, and perhaps it was intended in *Campbell* v. *Spottiswoode* (1) (a case which has never been questioned) to leave it unsettled, what is the standard for the jury of "fair criticism"? The criticism is to be "fair," that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls "fair," and, although we cannot find in any decided case an exact and rigid definition of the word "fair," this is because the judges have always preferred to leave the question what is "fair" to the jury. The nearest approach, I think, to an exact definition of the word "fair" is contained in the judgment of Lord Tenterden, C.J., in *Macleod* v. *Wakley* (2), where he said, "Whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel." It must be assumed that

(1) 3 B. & S. 769.

(2) 3 C. & P. at p. 313.

1887

MERIVALE v. CARSON.

Bowen, L.J.

a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.

In the case of literary criticism it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticising. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. *Campbell* v. *Spottiswoode* (1) was a case of that kind, and there the jury were asked whether the criticism was fair, and they were told that, if it attacked the private character of the author, it would be going beyond the limits of fair criticism. Still there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism—I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adultery cavalierly, when in fact there is no adultery at all in the story. A jury would have a right to consider the latter beyond the limits of fair criticism.

Applying the law to the present case, we have to see whether the learned judge misdirected the jury, having regard to their finding as to the true construction of the article. Their construction of the words of the article could not have been affected by what he said to them about the meaning of "fair criticism." The alleged libel stated that the story of the plaintiffs' play turned upon adultery. In a case of manifest misdescription such as this the judge is not bound to go into all the minutiæ as if the libel had been of a different character, and his summing-up must be read with reference to this fact. I have read through the summing-up of Field, J., and, though I do not think that his language was altogether exact, yet what possible harm could it have done having regard to the facts of the case? The jury had

(1) 3 B. & S. 769.

1887

MERIVALE v. CARSON.

Bowen, L.J.

to deal with a case of positive misdescription, a question not of opinion, but of fact. Did not that fall clearly beyond the limits of fair criticism? Could this Court since the Judicature Act set aside the verdict of the jury, merely because the language of the learned judge was not exactly that which he would have used if he had written his summing-up? Assuming the interpretation the jury put on the meaning of the words to be correct, as we must assume, I entertain no doubt as to the correctness of the remainder of the verdict. And, even if the view of the law as to privilege which I do not adopt were the right view, I do not think it would make any difference in the present case, because, the misrepresentation being clear, the writer having not merely said that the play had an evil tendency, but having imputed to the authors that it was founded on adultery when there is no adultery at all in it, the jury would have inferred, if the question had been left sufficiently to them, that the writer was actuated by a malicious motive; that is to say, by some motive other than that of a pure expression of a critic's real opinion.

Appeal dismissed.

Solicitor for plaintiffs: *D. E. Langham, for Langham & Son, Eastbourne.*

Solicitor for defendant: *T. Lamartine Yates.*

W. L. C.

M'CLEAN, APPELLANT; PRICHARD AND TILLSTONE, RESPONDENTS.

Nov. 29.

Parliament—Registration—Borough Vote—Service Franchise—Municipal Vote—Representation of the People Act, 1884 (48 *Vict. c.* 3), *s.* 3—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9.

Occupation of a dwelling-house by virtue of an office, service, or employment within the meaning of the Representation of the People Act, 1884 (48 Vict. c. 3), s. 3, is no qualification for the municipal franchise.

CASE stated by the revising barrister for the borough of Brighton.

It appeared that objection was made to the retention of the name of the appellant on Division One of the occupiers' list for the parish of Brighthelmstone, in the borough of Brighton, and

1887

M'CLEAN v. PRICHARD.

application was made that it should be transferred to Division Two. Division One consists of "persons entitled both to be registered as parliamentary voters and to be enrolled as burgesses," Division Two of "persons entitled to be registered as parliamentary voters but not to be enrolled as burgesses."

The qualifying premises were 22, Carlton Hill, a coffee house, let by the owner to a committee, and managed by the appellant as their servant. The respondent admitted that the occupation was such as to render the appellant an inhabitant occupier by virtue of an "office, service, or employment" under the Representation of the People Act, 1884 (48 Vict. c. 3), s. 3, and that the appellant was therefore entitled to be placed upon Division Two. It appeared that the premises were rated, and the receipts for rates made out in the name of the appellant, and that the appellant was also entered in the "occupiers' column" of the rate-book, but that the committee paid the rates.

The revising barrister held that the appellant did not possess a municipal qualification and transferred the name from Division One to Division Two. If he was wrong, the name was to be restored to Division One.

Clough, for the appellant. The appellant is entitled to be placed upon the burgess roll. The case finds that he is an inhabitant occupier, entitled as such to the parliamentary service franchise. (1) He actually uses the premises, and, in the plain and popular sense of the term, "occupies" them. The case also finds that he is rated in respect of the premises. There is therefore evidence of occupation and rateability, at law the two essential qualifications for the municipal franchise.

Newson, for the respondent, was not heard.

LORD COLERIDGE, C.J. This appeal must be dismissed. The revising barrister has decided correctly and has placed the

(1) By the Representation of the People Act, 1884 (48 Vict. c. 3), s. 3: "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any other person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant."

appellant in the only division of the list for which he has a legal qualification. The appellant has no claim to be enrolled as a burgess of Brighton. Before the Representation of the People Act, 1884, the class to which he belongs possessed neither the parliamentary nor the municipal franchise, and by that Act parliament gave them the former and the former only. The word "occupier" is relied on; but "occupation" is a technical term, and means legal, not mere physical occupation, and the appellant is still as little an occupier for the purposes of the municipal franchise as he was before the passing of the Representation of the People Act, 1884.

POLLOCK, B., and HAWKINS, J., concurred.

Appeal dismissed.

Solicitors for appellant: *R. Ballard & Co.*

Solicitors for respondent, the town clerk of Brighton: *Boxall & Boxall, for Freeman, Gell & Co., Brighton.*

H. D. W.

BRIDGES *v.* MILLER.

Nov. 28.

Parliament—Registration—Borough Vote—Residence of Freeman—Notice of Objection—Power of Amendment—Reform Act, 1832 (2 & 3 *Will.* 4. *c.* 45), *s.* 32—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2.

By the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 32, no freeman of a city or borough is entitled to be registered as a parliamentary voter in any year unless "he shall have resided for six calendar months next previous to the last day of July (now by the Parliamentary and Municipal Registration Act (41 & 42 Vict. c. 26), s. 7, 15th of July) in such year within such city or borough or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken."

A notice of objection was served on a freeman of Norwich dated August 12, and containing as the ground of objection the statement "That you do not reside at 12, Clifton Street, Norwich." The revising barrister held that the notice was sufficient, but amended it by substituting in it the words "That you have not resided at 12, Clifton Street, Norwich, for six calendar months next preceding the 15th day of July last, and that you have not throughout that period resided within the city of Norwich or seven miles thereof":—

Held, that the notice was bad, and that the defect in it was not a "mistake" within the meaning of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 2, so that the revising barrister had no power to amend.

CASE stated by one of the revising barristers for the city of Norwich.

1887

BRIDGES v. MILLER.

The appellant was objected to as not being entitled to be placed on the parliamentary register as a freeman of the city of Norwich. The notice of objection, which was dated August 12, 1887, was addressed to "Mr. Henry Bridges, of 12, Clifton Street, Norwich, and contained the following ground of objection: "That you do not reside at the above address."

Evidence was admitted which shewed that the appellant had not "resided for six calendar months next previous to the 15th July, 1877," at the address in question, "or within the city of Norwich or within seven miles thereof," the qualifying period and distance for freemen under the Reform Act, 1832.

It was contended on behalf of the appellant that the notice was bad, as it did not point to non-residence during the qualifying period, and that it could not be amended.

The revising barrister considered that the notice was good, though informal, as it gave sufficient information of the nature of the objection, but amended it as follows, in order to bring it into conformity with s. 32 of the Reform Act, 1832:—"That you have not resided at the above address for six calendar months next preceding the 15th day of July last, and that you have not throughout that period resided within the city of Norwich or within seven miles thereof." He then allowed the objection and expunged the name of the appellant from the list, and also those of seven other persons who were objected to in like manner and whose appeals were consolidated. If the Court should be of opinion that the notices of objection in their original form were insufficient, or that the barrister had no power to amend them, the names of the appellant and the other seven freemen were to be restored to the list.

Asquith, for the appellant. The objection was invalid. Non-residence at the date of the notice is no ground for objection to the vote of a freeman under the Reform Act, 1832, s. 32. It is, however, the only ground stated in the notice, and the statutes which deal with parliamentary registration limit the objector in the strictest manner to the grounds in the notice of objection. See Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 26, and County Voters Registration Act, 1865 (28 & 29 Vict. c. 36), s. 7. No question therefore of non-residence

under the Reform Act was or could be raised before the revising barrister, and he had no power to hear evidence on that issue. The revising barrister had also no power of amendment, as the mistake here was in no sense a clerical error within the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 2.

R. S. Wright, for the respondent. The revising barrister has merely inserted in the notice of objection words which it by implication contains. "Residence", in such a case can only mean residence for six months in or within seven miles of the city. The voter would have so understood the notice without explanation. Thus the correction related to a mere matter of form, and was a "mistake" within the statutory power of amendment possessed by the revising barrister.

LORD COLERIDGE, C.J. I am of opinion that the notice of objection was bad. In order to be registered as a parliamentary voter, a freeman of Norwich must have resided within seven miles of the city polling-booth for six months, which are now computed from July 15. The Reform Act makes such residence indispensable. An objection, therefore, on the ground of non-residence should, if it is to be valid, state that the freeman has not lived within this distance for this period. This objection, which is dated Aug. 12, simply says: "You do not reside at 12, Clifton Street, Norwich." Take it that Clifton Street is in Norwich, and that the non-residence imputed is proved, there is still nothing to shew that the freeman either has or has not resided for the six months required by law. The objection, therefore, is no objection at all. It has been amended by the revising barrister; but there are limits to his statutory power of amendment. He can "correct" a "mistake," but the defect in this objection is in no sense a "mistake." The objection is accurate enough in point of expression. Its fault is that it is bad, and the revising barrister, in making it good, has exceeded his power of amendment. The appeal must be allowed.

POLLOCK, B. I also think that the appellant must succeed. I find nothing in either the letter or the spirit of the enactments

1887

BRIDGES v. MILLER.

with respect to parliamentary registration which can be supposed to give a revising barrister such an extensive power of amendment as the respondent has contended for.

HAWKINS, J. I am of the same opinion. The error of the objector probably arose from a mistaken view of the law as to residence. Clearly, however, the revising barrister had no power to correct the notice.

Appeal allowed.

Solicitor for appellant: *Gover, for English, Norwich.*

Solicitors for respondent: *Sharpe, Parkers, Pritchard & Sharpe.*

H. D. W.

Nov. 30.

CHILDS, APPELLANT; COX, RESPONDENT.

Parliament—Registration—Borough Vote — Service of Notice of Objection— "Ordinary course of Post"—6 Vict. c. 18, *ss.* 17, 100.

Notices of objection to borough voters under 6 Vict. c. 18, s. 17, were addressed to barracks in which the voters resided, and were posted in time to have been delivered on August 20 by postmen in the ordinary course of post at places within the borough elsewhere than at the barracks. Letters addressed to the barracks were never delivered at the barracks by postmen, but were taken from the post-office by orderlies. On the evening of August 20 the letters addressed to the barracks were taken from the post-office by orderlies. Some of such letters were distributed at the barracks on August 20, others on August 21, while with respect to others there was no evidence as to the time of distribution:—

Held, that the facts did not shew that there was any "ordinary course of post" to the barracks within the meaning of s. 100, and that therefore there was no evidence that the notices had been served on August 20.

CASE stated by the revising barrister for the borough of Woolwich. The material facts were as follows:—

The appellant objected to the names of Robert Dendy, Frederick Francis Johnson, and forty-three other persons being retained on the occupiers' list of voters.

According to the list the address of Robert Dendy was 43, Staff Serjeants' Quarters, Royal Artillery Barracks, and that of Frederick Francis Johnson was C. Field, Officers' Quarters, Commissariat and Transport Corps Barracks. Notices of objection directed to these addresses were posted by the objector at

1887

CHILDS v. COX.

Woolwich on August 20, 1887, the last day for giving notices of objection. He produced stamped duplicates, and the following evidence was given as to the circumstances under which the notices were posted: They were posted in Woolwich on August 20, 1887, at about 6 P.M. Letters posted at that hour would, in the ordinary course of post, be delivered in Woolwich elsewhere than at the barracks on the same evening by a delivery which commenced about 9 P.M. Letters addressed to the barracks are not delivered at the barracks by postmen, but are called for and received at the post-office by orderlies, pursuant to military regulations and directions to the postmaster. On the evening of August 20, 1887, the letters for the barracks in question were taken from the post-office by two orderlies. Those for officers were distributed at both barracks the same evening, those for non-commissioned officers and men were not distributed at the Royal Artillery Barracks till the following morning August 21, and there was no clear evidence as to when they were distributed at the Commissariat and Transport Corps Barracks.

The revising barrister held that there was no evidence that the objector had given the notices required by law, as it did not appear that there was any "ordinary course of post" within 6 Vict. c. 18, s. 100, by which the notices would have been delivered before midnight on August 20, 1887. He, therefore, retained the names of these and the other forty-three voters on the list. The question was whether he was right in so doing.

Asquith, for the appellant. Either s. 17 or s. 100 of 6 Vict c. 18, applies. If s. 17 applies the objector has "caused" the notices "to be left" at the addresses during August 20 within the meaning of that section.

[HAWKINS, J. Can the orderly be regarded as the agent of the objector?]

It is submitted that he practically was so. Otherwise if s. 100 applies, the case finds in effect that the notices "would in the ordinary course of post have been delivered" at the addresses during August 20 within the meaning of that section.

[HAWKINS, J. There appears to be no postal delivery of letters at the barracks.]

1887

CHILDS v. COX.

The employment of orderlies can make no difference. In large mercantile houses it is a common practice to send a clerk to the post-office with a bag for letters. The effect of an arrangement of this kind cannot be to invalidate notices which are otherwise good.

Hormsby v. *Robson* (1) is in favour of the appellant. In *Lewis* v. *Evans* (2) there was no postal delivery at the residence of the person objected to, and the Court held that there was no evidence of service. But it is implied in the judgment of Brett, J., that the Court would have held otherwise had it been proved that the person objected to made a practice of sending to the post-office for his letters.

Channell, Q.C., and *Rentoul*, for the respondent, were not heard.

POLLOCK, B. The question is whether these notices of objection have been duly delivered under the statute. Under the statute the objector may either himself deliver the notice in accordance with s. 17, or, as here, he may send the notice by post in accordance with s. 100. In this case s. 100 provides for the stamping of a duplicate notice by the postmaster of the office where the notice is posted, and enacts: "The production by the party who posted such notice, of such stamped duplicate, shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would in the ordinary course of post have been delivered to such place." The facts of which the duplicate is to be statutable evidence clearly involve the existence of an "ordinary course of post." If it were a question of mere delivery, perhaps the orderly, though the agent of the voter to receive the notice might also be accounted the agent of the objector to deliver it. But in order to make the duplicate notice available as evidence, it must appear that the notices would have been, not merely delivered, but "delivered in the ordinary course of post" during August 20. The case shews that on August 20 no "ordinary course of post" existed. There was an arrangement by which orderlies were sent to the post-office for letters addressed to the

(1) 26 L. J. (C. P.) 55. (2) Law Rep. 10 C. P. 297.

barracks. But this arrangement was itself in substitution for "delivery in the ordinary course of post." I am of opinion that the decision of the revising barrister was right.

HAWKINS, J. I am of the same opinion. If it were possible to treat the orderlies as agents of the objector, there would be some evidence of delivery to the officers on August 20, while as regards some of the non-commissioned officers and men there would be no evidence as to date of delivery, and as regards others there would be evidence of delivery on August 21. I do not, however, think that the orderlies can be regarded as agents of the objector, so that there is no question of service under s. 17. As regards service through the post-office under s. 100, it is essential that the notices shall be posted so as to be deliverable in "the ordinary course of post" on August 20. The case seems to me to shew that no "ordinary course of post" existed which made the notices deliverable on this day. They were received by the orderlies late on the evening on August 20, and there is nothing in the case which shews any duty on the part of such orderlies, either to the voters or to the post-office, if indeed the orderlies could have any duty to the post-office, to have distributed the letters the same evening.

LORD COLERIDGE, C.J., concurred.

Appeal dismissed.

Solicitor for appellant: *T. M. M'Donnell.*
Solicitor for respondent: *E. T. Hughes.*

H. D. W.

1887
Nov. 28.

HUMPHREY *v.* EARLE.

Parliament—Registration—County Vote—Notice of Objection—Description of Place of Abode of Objector—Registration Act, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 2, *Form I., No.* 2.

A notice of objection to a county vote was signed "G. C., of Churchyard, on the list of parliamentary voters for the parish of Petersfield":

Held, that the place of abode of the objector was insufficiently described under the Registration Act, 1885 (48 Vict. c. 15), s. 18, Sched. 2, Form I., No. 2.

CASE stated by the revising barrister for the Petersfield division of the county of Hants.

It appeared that the appellant, William Humphrey, was objected to as not being entitled to have his name retained on the occupiers' list for Hambledon. The notice of objection was signed as follows:—

"(Signed) George Chapman,
of Churchyard.
On the list of parliamentary voters for the parish of Petersfield."

The objector lived in a house in Petersfield churchyard, and his address as given in the occupiers' list for the parish of Petersfield was "Churchyard, Petersfield."

At the revision court it was contended that the notice was bad on the ground that "of Churchyard" was not a sufficient description of the place of abode of the objector. The revising barrister held that these words were a sufficient description, and that the notice was good, and erased from the list the name of the appellant and those of sixteen other persons who were objected to by similar notices, and whose appeals were consolidated. If the Court held that the revising barrister was wrong, the names were to be restored to the list.

J. Alderson Foote, for the appellant. The notice of objection is bad. By s. 18 of the Registration Act, 1885 (48 Vict. c. 15), use is to be made of the forms in the schedule, and by Form I., No. 2. in Sched. 2 (1), a notice of objection is to contain a description of

(1) Registration Act, 1885 (48 Vict. c. 15), Sched. 2, Form I., No. 2. Description of objector.

"Signed A. B. of [*place of abode*] on the list of parliamentary voters for the parish of . . . ."

the objector's place of abode. The words "of Churchyard" are of themselves not such a description, and "Petersfield" cannot be added out of the context, because the objector is a county voter, and if his qualification were a property one, his being "on the list of parliamentary voters for the parish of Petersfield" would shew nothing as to his place of abode.

He cited *Woollett* v. *Davis* (1); *Sheldon* v. *Flatcher* (2); *Norris* v. *Pilcher* (3); *Jones* v. *Pritchard.* (4)

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. I am of opinion that the revising barrister was wrong. The description of the objector's place of abode, as given in the notice of objection, is not sufficient. There is, it appears, a churchyard at Petersfield, but the notice does not say "the churchyard," and the objector need not live at Petersfield. The point is technical, but, were we to decide against it, we should, I fear, be opening a door to the very looseness which the Act was intended to prevent. The appeal will, therefore, be allowed.

POLLOCK, B. I am of the same opinion. The words "on the list of parliamentary voters for the parish of Petersfield" tell the voter nothing as to the objector's address. Unless he were on some list of voters for the county division in which the parish is, he could not legally object, but he may be on the list for the parish of Petersfield, in Hants, and may yet live anywhere in England. The words "of Churchyard" are also perfectly vague. They may refer to any parish or hamlet, whether in the Petersfield division or elsewhere. As my Lord has said, the point is technical; but on the other hand, it is important that these notices should strictly follow the statutory form, and I think that the Court ought not to establish a kind of cy-près doctrine for the benefit of careless objectors.

HAWKINS, J. I am of the same opinion. The form under the Act requires the place of abode of the objector to be stated in the notice of objection. Here the words which purport to comply

(1) 4 C. B. 115.
(2) 17 L. J. (C.P.) 34.
(3) Law Rep. 4 C. P. 417.
(4) Law Rep. 4 C. P. 414.

1887

HUMPHREY v. EARLE.

with this requirement are "of Churchyard." These words are followed by the parliamentary qualification of the voter "on the list of parliamentary voters for the parish of Petersfield." Were the franchise and the power of objecting limited to persons residing in Petersfield, it might perhaps be possible to supplement the description of the place of abode out of that of the qualification, so as to make up an address. But as persons living in all parts of England may be on the Petersfield list of voters, there is nothing to connect the statement as to the place of residence with that as to the parliamentary qualification.

Appeal allowed.

Solicitors for appellants: *Lambert, Petch, & Shakespear, for F. J. & J. C. Warner, Winchester.*

H. D. W.

WOOD *v.* CHANDLER. 1887 *Nov.* 29.

Parliament—Registration—Borough Vote—Notice of Objection—Description of Objector—Registration Act, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 3, *Form (I.), Nos.* 1 *and* 2.

A notice of objection was signed: "R. B. on the list of parliamentary voters for the parliamentary borough of Battersea and Clapham."

The borough of Battersea and Clapham consists of two divisions, those of Battersea and Clapham, and contains two parishes, those of St. Mary, Battersea, and Clapham. The Battersea division is wholly in the parish of St. Mary, Battersea, the Clapham division is partly in that parish and partly in that of Clapham. The name of the objector was in the list of occupiers for the parish of Clapham in the Clapham division:—

Held, that the notice was insufficient, as it did not state the parish on the list of voters for which the objector's name was to be found.

CASE stated by the revising barrister for the borough of Battersea and Clapham.

The appellant, John Wood, was objected to as not being entitled to be retained on the occupiers' list by a notice of objection signed as follows:

"Raymond Batchelor, of 624, Wandsworth Road, on the list of parliamentary voters for the parliamentary borough of Battersea and Clapham."

It was contended that the notice was invalid as not being in accordance with Form (I.), Nos. 1 and 2 in Sched. 3 to the Registration Act, 1885 (48 Vict. c. 15), s. 18.

The borough of Battersea and Clapham consists of two divisions, those of Battersea and Clapham, and contains two parishes, those of St. Mary, Battersea, and Clapham. The Battersea division is wholly in the parish of St. Mary, Battersea, the Clapham division is partly in that parish and partly in the parish of Clapham. The name of the objector was on the list of occupiers for the parish of Clapham in the Clapham division.

The revising barrister held that the notice was good, and erased the name of the appellant and those of twenty-five other persons who were objected to by similar notices, and whose appeals were consolidated. If he was wrong the names in question were to the restored to the list.

1887

WOOD v. CHANDLER.

Macaskie, for the appellant. The notice of objection is invalid. It does not state the parish on the list for which the objector's name is to be found, in accordance with Form (I.), Nos. 1 and 2, Sched. 3 to the Registration Act, 1885 (48 Vict. c. 15), s. 18. (1)) A precise reference to the parish or township is essential, and the saving clause in s. 18 does not apply. In many of the constituencies there are several parishes or townships each with its own list. The form is the same as that under the Act previously in force, the Registration Act, 1843 (2), and *Eidsforth* v. *Farrer* (3) leaves no doubt that under that Act this notice would have been invalid. The legislature cannot have intended, while enlarging the constituencies, to increase the difficulty of the voter in searching for the objector.

[He also cited *Samuel* v. *Hitchmough* (4); *Crowther* v. *Bradney* (5); *Oram* v. *Cole* (6); *James* v. *Howarth* (7); *Bollen* v. *Southall.* (8)]

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. I am of opinion that this appeal should be allowed. We are not called upon to decide whether the revising barrister might have amended the notice of objection. On that point I express no opinion. We have to determine whether the notice in its original shape was good. Now the 18th section of the Registration Act, 1885, enacts that a certain form of notice of objection "shall be used and observed." This notice is not in that form. It states that the objector is a voter for the borough, which he must be in order to be qualified to object, but it does not state, in accordance

(1) By the Registration Act, 1885 (48 Vict. c. 15), s. 18: "The forms and instructions contained in the second and third schedules to this Act shall be used and observed in all cases to which they apply . . . . but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing." In Form (I.), Nos. 1 and 2, Sched. 3, the description of the objector is as follows: "A. B. of [*place of abode*] on the list of parliamentary voters for the parish [or township] of ——."

(2) See Registration Act, 1843 (6 & 7 Vict. c. 18), s. 17, Schedule B, Forms 10, 11, and (saving clause) s. 101.

(3) 4 C. B. 9; 16 L. J. (C.P.) 132.

(4) 13 C. B. (N.S.) 3; 32 L. J. (C.P.) 55.

(5) 15 C. B. (N.S.) 536; 33 L. J. (C.P.) 70.

(6) 34 L. J. (C.P.) 52.

(7) 5 C. P. D. 225.

(8) 15 Q. B. D. 461.

with the form, the parish in which the objector is an occupier. The section, it is true, says, "a disregard of any form shall not of itself invalidate any notice." But I do not think that these words are intended to sanction a complete disregard of the forms which are to be "used and observed." There must be some limitation, and in this case I think the disregard goes too far. The result to the voter of being left in the dark as to which list to examine may be extreme inconvenience. The omission is, therefore, not cured by s. 18, and the notice of objection is bad.

POLLOCK, B. I am of the same opinion. It seems to me that *Eidsforth* v. *Farrer* (1) applies, and that the effect of the Redistribution of Seats Act, 1885 (2) is to render precision in these respects more necessary than ever. The voter ought to be put to no unnecessary trouble in searching the lists for the objector. We are not called upon to decide as to whether the notice could have been amended.

HAWKINS, J. I am of the same opinion. The legislature intends that the voter shall have a ready means of ascertaining whether the objector is qualified to object. It therefore provides that the "parish or township" for which he votes shall appear in the objection. There may be several parishes or townships in a constituency, and, unless the notice refers accurately to that in which the objector votes, the voter may have to consult several lists. For this reason I regard a description of the parish as of the essence of the notice, and a failure to describe it as more than a disregard of a form within the meaning of the saving clause. I say nothing as to the revising barrister's power of amendment.

Appeal allowed.

Solicitor for appellant: *H. W. Chatterton.*

(1) 4 C. B. 9; 16 L. J. (C.P.) 132. (2) 48 & 49 Vict. c. 23.

H. D. W.

1887
Nov. 28.

BEAL *v.* TOWN CLERK OF EXETER.

Parliament—Registration—Borough Vote—Freeholder—Residence—Reform Act, 1832 (2 & 3 *Wm.* 4, *c.* 45), *s.* 31.

The appellant, who claimed to be registered as a voter for the city of Exeter, had a bedroom kept for his exclusive use in his father's house in Exeter. During the qualifying period he went to London in quest of employment, and having obtained a temporary situation in London remained there for two months and then returned to his father's house in Exeter. He remained in Exeter three weeks and then went back to London, and obtaining employment there did not return to Exeter during the rest of the qualifying period:—

Held, that the facts did not shew a constructive residence in Exeter during the qualifying period within the meaning of the Reform Act, 1832 (2 & 3 Wm. 4, c. 45), s. 31.

CASE stated by the revising barrister for the city and county of Exeter.

The appellant objected to the name of one Robins being retained on the list of voters in respect of a freehold house in the city and county of Exeter, on the ground that the voter had not "resided for six calendar months next previous to" July 15, 1887, "within such city, or within seven miles thereof," pursuant to the Reform Act, 1832 (2 & 3 Wm. 4, c. 45), s. 31. It appeared that up to January, 1887, the voter, who was a single man, lived in his father's house in Exeter as a member of the family, occupying without payment of rent a bedroom, which was set apart for his exclusive use. In January, 1887, the voter went to London in search of employment. He obtained a temporary situation as a draper's assistant, in which he remained for two months, and then returned to his father's house at Exeter. After remaining there in the occupation of his bedroom as before for three weeks, he went back to London, and shortly after his arrival obtained a situation as a draper's assistant, in which he continued without leaving London till after July 15. The revising barrister held that these facts shewed a constructive residence in Exeter during the qualifying period, and retained the name of the voter on the list. The objector appealed.

J. Alderson Foote, for the appellant. The case does not shew constructive residence in Exeter. It shews actual residence in

London, broken by a visit to Exeter. The short time passed within the qualifying limit might not be fatal, if there were clear evidence of the power to return, and of the intention to return, both continuing throughout the whole of the qualifying period. But there is no evidence of either the one or the other. For anything that appears to the contrary, during both periods of employment, the voter could not have gone down to Exeter on any day except Sunday without breaking his contract with his employer. His evident intention, too, was to remain in London. It was only because he failed to obtain a situation there that he went back to Exeter at all.

[He cited *Powell* v. *Guest* (1); *Ford* v. *Drew* (2); *Ford* v. *Hart*. (3)]

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. The Court has to decide whether the facts shew that the voter resided in Exeter for six months before July 15. If they do not shew this, the revising barrister is wrong. It is not our duty to frame a definition of residence. We have only to say whether, consistently with good sense, this voter, who is proved to have lived in London for all but a few weeks of the six months, can notwithstanding be said to have resided in Exeter during these six months. This question admits, it appears to me, of only a negative answer. Constructive residence, such as is here required, may often be easily inferred. The residence of a wife and children can be imputed to the absentee, and the residence may also be inferred in the case of a barrister on circuit or a sailor at sea, when there is no doubt of both the power and the intention to return as soon as the circuit or the voyage is over. Here during most of the qualifying period the voter was an assistant in a shop in London. During all this time therefore he had no power to return to Exeter. Also after his visit to Exeter, while out of employment, the voter evidently never throughout the period had the intention to return to Exeter. It follows that there was no constructive residence. The appeal must, therefore, be allowed.

(1) 18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69. (2) 5 C. P. D. 59.
(3) Law Rep. 9 C. P. 273.

1887

BEAL v. TOWN CLERK OF EXETER.

POLLOCK, B. I am of the same opinion. The case appears to resemble *Ford* v. *Drew*. (1)

HAWKINS, J. I am of the same opinion. In order to return to Exeter the voter must have broken his contract with his employer in London. It is clear, however, that the voter never contemplated any such proceeding.

Appeal allowed.

Solicitor for appellant: *S. D. Hamilton, for Friend & Beal, Exeter.*

H. D. W.

Nov. 28.

EDWARDS *v.* LLOYD.

Parliament — Registration — Borough Vote — Disqualification — "Other alms which by the law of Parliament disqualify"—Reform Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 36.

The claimants during the qualifying period occupied almshouses in a borough and received out of a charitable fund for the sustenance of the inmates allowances of 6*s.* a week. The charity was regulated by an Act of Parliament, which provided that the inmates of the almshouses were to be persons "who from age, ill-health, accident, or infirmity should be unable to maintain themselves":

Held, that the facts shewed a receipt of "alms which by the law of Parliament disqualify from voting" under the Reform Act, 1832 (2 & 3 Wm. 4, c. 45), s. 36, and that the claimants were not entitled to be registered as voters.

CASE stated by the revising barrister for the borough of Denbigh.

The appellant objected to the retention on the list for Ruthin in the borough of the names of John Evans and four other other persons on the ground that "within twelve months next previous to July 15, 1887," such persons "had received alms which by the law of Parliament disqualify from voting" under the Reform Act, 1832 (2 & 3 Wm. 4, c. 45), s. 36.

It appeared that the voters in question were inmates of Christ's Hospital, Ruthin, each living in an almshouse, the qualifying property, and receiving a weekly allowance of 6*s.* The institution was conducted pursuant to statute 26 & 27 Vict. c. lix., s. 23

(1) 5 C. P. D. 59.

1887

EDWARDS v. LLOYD.

of which is as follows: "The almspeople, respectively, shall be poor persons, not less that fifty years of age, of good character, and not having a wife or husband living, who shall reside in the borough of Ruthin without receiving parish relief for not less than five years preceding the time of their appointment, and who from age, ill-health, accident, or infirmity shall be unable to maintain themselves by their own exertions, with preference for those persons who being otherwise qualified as aforesaid shall have become reduced by misfortune from better circumstances." It also appeared that of the five voters one occupied a shop in Ruthin as a shoemaker, and that the other four earned sums of from 3*s.* to 9*s.* a week in addition to their allowances as almsmen. The revising barrister held that the facts did not shew such a receipt of alms as to disqualify within the meaning of the Reform Act, 1832, s. 36, and retained the names on the list.

The objector appealed.

Asquith, for the appellant. The voters were "in receipt of other alms such as by the law of Parliament disqualify" within the Reform Act, 1832, s. 36, and ought to have been removed from the list. The charity is limited to persons who "from age, ill-health, accident, or infirmity are unable to maintain themselves." This fact of itself brings the case within *Harrison* v. *Carter* (1) and *Baker* v. *Town Clerk of Monmouth* (2), in which recipients of similar alms were held to be disqualified. In the former case the relief given consisted merely of small sums of money, sometimes not more than 2*s.* 6*d.*, given annually, and obviously the donees earned wages as here. But, because the trust was for the "poorest inhabitants of the tything," those small doles were held to be disqualifying alms.

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. I am of opinion that the revising barrister was wrong. The key of the case is the limitation of the charity to persons "unable to maintain themselves by their own exertions." We are bound to maintain *Harrison* v. *Carter* (1)

(1) 2 C. P. D. 26. (2) 53 L. T. (N.S.) 668.

1887

EDWARDS v. LLOYD.

and *Baker* v. *Town Clerk of Monmouth* (1), and these words of themselves bring the case within those decisions.

POLLOCK, B., and HAWKINS, J., concurred.

Appeal allowed.

Solicitors for appellant: *Kennedy, Hughes & Kennedy, for R. H. Roberts, Denbigh.*

H. D. W.

1888

Jan. 16.

[IN THE COURT OF APPEAL.]

THE REAL AND PERSONAL ADVANCE COMPANY, LIMITED *v.* CLEARS.

Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Form in Schedule, Deviation from—"Sum thereby secured"—Covenant necessary for maintaining the Security.*

By a bill of sale given to secure the repayment of an advance with interest thereon at the rate of 40 per cent. per annum, by equal monthly payments of 4*l.* each until the whole of the principal money and interest should be paid, it was provided that, if the mortgagor did not pay the rent, rates, taxes and outgoings of the premises on which the goods assigned might be within seven days after the same should respectively become payable, the mortgagees might, if they thought fit, pay such rent, rates, taxes and outgoings, and all sums of money so paid by the mortgagees, together with interest thereon after the rate aforesaid, should be charged on the goods assigned, and should be recoverable in the same manner as the principal moneys and interest secured by the bill of sale; it was further provided that the goods assigned should be liable to seizure for any of the causes specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, but should not be liable to seizure for any other cause:—

Held, that such bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, on the ground that it contained terms importing a power of seizure in contravention of the provisions of s. 7 of the Act.

Bianchi v. *Offord* (17 Q. B. D. 484) followed: *Ex parte Stanford, In re Barber* (17 Q. B. D. 259), and *Goldstrom* v. *Tallerman* (18 Q. B. D. 1), distinguished.

APPEAL of plaintiffs from the judgment of the Queen's Bench Division (Lord Coleridge, C.J., and A. L. Smith, J.), affirming on appeal the decision of the judge of the Westminster County Court.

(1) 53 L. T. (N.S.) 668.

1888

REAL AND PERSONAL ADVANCE COMPANY v. CLEARS.

The facts were as follows: The action was brought by the grantees of a bill of sale to recover a pianoforte included in the bill of sale from the defendant, a pawnbroker with whom it had been pledged by the grantor of the bill of sale subsequently thereto. It was contended for the defendant that the bill of sale was void as not being in accordance with the provisions of the Bills of Sale Act (1878) Amendment Act, 1882. By the bill of sale, which was given to secure repayment of an advance with interest at the rate of 40 per cent. per annum by equal monthly payments of £4 each, the first to be made on the 20th of May then next and a like payment on the third Wednesday in each succeeding month until the whole of the said principal sum and interest should be paid, the mortgagor agreed that during the continuance of the security he would pay the rent, rates, taxes and outgoings of the premises whereon the goods assigned might be within seven days after the same should respectively become payable, and would immediately on the expiration of such seven days produce to the mortgagees, upon demand being made in writing, the respective receipts for such rent, rates, taxes and outgoings respectively, and that, if the mortgagor should neglect or refuse to pay the said rent, rates, taxes and outgoings within the said seven days, or on the expiration thereof to produce to the mortgagees as aforesaid the respective receipts for such rent, rates, taxes and outgoings respectively, then, and in any such case, it should be lawful for the mortgagees, if they should think fit, to pay any rent, rates, taxes and outgoings of the said premises which might then be due and owing, and that all sums of money so paid by the mortgagees, together with interest thereon after the rate aforesaid, computed from the date of payment up to the actual day of repayment, should be charged on the goods assigned, and should be recoverable in the same manner as the principal moneys and interest thereby secured: and it was thereby agreed and declared that the goods assigned should be liable to seizure or to be taken possession of by the mortgagees for any of the causes specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, and that they should not be liable to seizure or to be taken possession of by the mortgagees for any cause other than those specified in that

1888

REAL AND PERSONAL ADVANCE COMPANY v. CLEARS.

section. The county court judge held the bill of sale void, and nonsuited the plaintiffs. The Divisional Court on appeal affirmed his decision, being of opinion that the case came within the authority of *Bianchi* v. *Offord*. (1)

Boxall, for the plaintiffs. The case of *Bianchi* v. *Offord* (1) cannot be reconciled with *Ex parte Stanford, In re Barber* (2), and *Goldstrom* v. *Tallerman*. (3) In both those cases a provision, that the mortgagee might pay rent, taxes, and outgoings, and thereupon the sums so paid by the mortgagee should be repaid by the mortgagor, and until repayment should be a charge on the goods assigned, was held not to avoid the bill of sale. That provision is absolutely identical with the stipulation in this bill of sale.

J. F. Clerk, (*Finlay, Q.C.*, with him), for the defendant. There is a material distinction between the form of the stipulation in question in this case and in *Bianchi* v. *Offord* (1) and that of the stipulations in the cases of *Ex parte Stanford* (2) and *Goldstrom* v. *Tallerman*. (3) In the one case the sums so paid by the mortgagees are made recoverable in the same manner as the principal money and interest, and the goods are therefore made subject to immediate seizure upon default in repayment of such sums with interest at the rate aforesaid; in the other case such sums with the interest thereon are only made recoverable by action or by way of charge on the property assigned. It is one thing to say that the goods shall not be redeemed without repayment of these sums; it is another thing to say that for default of payment of them the goods may immediately be seized. The power of seizure cannot be given in cases not within s. 7 of the Act of 1882. The grounds of the judgment in *Bianchi* v. *Offord* (1) were that such sums as these cannot be sums secured within s. 7, sub-s. 1 of the Bills of Sale Act of 1882, because the time of payment is uncertain; and that this provision is not necessary for the maintenance of the security; and therefore the stipulation is at variance with the form given by the Act, because it gives a power of seizure where none is given by the Act. In *Hetherington*

(1) 17 Q. B. D. 484. (2) 17 Q. B. D. 259.
(3) 18 Q. B. D. 1.

v. *Groome* (1) it was held that where the sum secured was payable on demand the bill of sale was bad.

Boxall, in reply. If this bill of sale enables the goods to be seized on default in payment of these sums, so did the instrument in *Ex parte Stanford* (2) and *Goldstrom* v. *Tallerman* (3), for the words making such sums a charge on the goods must import that they are to be on the same footing as the original advance secured in all respects; and the effect of s. 7, sub-s. 1, of the Bills of Sale Act, 1882, is to make the goods subject to seizure on default in payment of the sum or sums secured. By the 4th section of the Bills of Sale Act, 1878, "bill of sale" includes any agreement by which a right to any charge on personal chattels is given, and it was held in *Ex parte Official Receiver, In re Morritt* (4), that there is an implied power to seize in a bill of sale in the statutory form. The effect of the judgments in *Ex parte Stanford* (2) and *Goldstrom* v. *Tallerman* (3) is that the covenant to repay these sums is necessary for the maintenance of the security, and therefore it might be inserted by the terms of the form in the schedule, and, if so, when the covenant is broken the right of seizure would arise under the latter part of s. 7, sub-s. 1.

[FRY, L.J. There is a difference between the wording of the 7th section, sub-s. 1, and that of the form. The words of the subsection are "necessary for maintaining the security." The words of the form are "which the parties may agree to for the maintenance of the security." How can an agreement to pay 40 per cent. interest on the sums so paid for rent, &c., and if it is not paid, that the goods may immediately be seized, be said to be necessary for the maintenance of the security?]

LORD ESHER, M.R. It is admitted that the bill of sale in this case is in the same terms as that in *Bianchi* v. *Offord* (5), and that it contains words which are different from those of the bills of sale in *Ex parte Stanford* (2) and *Goldstrom* v. *Tallerman*. (3) If therefore the difference is material, as I think it is, then the last mentioned cases do not govern the present case. The

(1) 13 Q. B. D. 789.
(2) 17 Q. B. D. 259.
(3) 18 Q. B. D. 1.
(4) 18 Q. B. D. 222.
(5) 17 Q. B. D. 484.

1888

REAL AND PERSONAL ADVANCE COMPANY v. CLEARS.

question therefore is, whether we are prepared to overrule the decision in *Bianchi* v. *Offord* (1), and, speaking for myself, I am not prepared to do so. That case decided that, where the bill of sale, which was given to secure repayment of a sum of money with interest at the rate of 40 per cent., provided that the mortgagee might, if the mortgagor failed to do so, pay any rent, rates, taxes, and outgoings of the premises on which the goods were, and that the sums so paid by him, with interest after the rate aforesaid, should be a charge on the goods assigned and should be recoverable in the same manner as the principal moneys and interest thereby secured, that is to say, by seizure of the goods, such bill of sale did not comply with the form in the schedule. Bowen, L.J., said, in giving judgment, that he did not think that such further sums could be sums secured by the bill of sale within the meaning of s. 7, sub-s. 1; and that there was nothing to shew that the provision for seizure on default in payment of these further sums was justifiable on the ground that the stipulation was necessary for the maintenance of the security. The result of that reasoning, if it is correct, is that there is a provision in this bill of sale which is at variance with the provisions of the Act, and which therefore cannot be within the power given by the form to add terms for the maintenance of the security. I am not prepared to overrule the decision in that case, and therefore, in my opinion, this appeal should be dismissed.

FRY, L.J. I am of the same opinion. Undoubtedly the cases on bills of sale are not entirely satisfactory, because they often turn on somewhat narrow distinctions and upon the construction of clauses not easy to construe. Here the mortgagor by the terms of the bill of sale agrees that he will pay the rent, rates, taxes, and outgoings of the premises, and, if he fails to pay them, the mortgagees may do so, and, if they do, the sums so paid, together with interest thereon "after the rate aforesaid," which is the very high rate of 40 per cent., shall be a charge on the premises and be recoverable in the same manner as the principal moneys and interest thereby secured. What is the

(1) 17 Q. B. D. 484.

meaning of these latter words? The principal sum and interest are recoverable either by action on the covenant to pay them or by seizure of the goods. Therefore it seems to me to follow that these sums and the interest thereon would be recoverable by seizure of the goods.

The 7th section of the Act provides that the goods shall not be liable to seizure except in the following cases: "(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security." Bowen, L.J., held, in *Bianchi* v. *Offord* (1), that sums paid in pursuance of such a provision as that contained in this bill of sale could not be sums secured within the meaning of the sub-section, and, therefore, that a stipulation which enabled the goods to be seized for default in payment of such sums could not be justified under the first part of the sub-section; and he further held that it did not appear that such a stipulation as this was necessary for the maintenance of the security. That being so, he seems to have been of opinion that the objection was not removed by a subsequent general stipulation that the goods should not be liable to be seized for any other cause than those specified in the 7th section; at the best the effect would be that there would then be contradictory clauses, and the instrument would be calculated to mislead the mortgagor. In my opinion his decision in that case was right and I do not think that it is at variance with anything that was decided in *Ex parte Stanford* (2) or *Goldstrom* v. *Tallerman.* (3) In both those cases the sums so paid by the mortgagee were dealt with in this manner: they were made a charge on the property assigned, and also there was a covenant that they should be repaid, but there was no power to seize for default of payment. The mode of recovery, therefore, in that case was either by way of charge when the rights of the parties respectively in respect of redemption or foreclosure of the property came to be worked out, or by action on the covenant. The instrument did not in either case give a right to recover by seizure of the goods; and therefore was not open to the objection successfully urged in

(1) 17 Q. B. D. 484. (2) 17 Q. B. D. 259. (3) 18 Q. B. D. 1.

1888

REAL AND PERSONAL ADVANCE COMPANY v. CLEARS.

Bianchi v. *Offord.* (1) For these reasons I think the appeal should be dismissed.

LOPES, L.J. I also am of opinion that the bill of sale in this case is void, as not having the same legal effect as the form in the schedule. It contains provisions which are not contained in the form, and which cannot, I think, be introduced into it under the provision enabling the parties to insert stipulations for the maintenance of the security. The cases of *Ex parte Stanford* (2) and *Goldstrom* v. *Tallerman* (3) appear to me distinguishable; and this case is on all fours with *Bianchi* v. *Offord* (1), which, in my opinion, was correctly decided.

Appeal dismissed.

Solicitors for plaintiffs: *Nye, Greenwood, & Moreton.*
Solicitors for defendant: *J. & C. Attenborough.*

E. L.

Jan. 20, 30.

[IN THE COURT OF APPEAL.]

IN RE BURDETT. EX PARTE BYRNE.

Bill of Sale—Validity—Departure from Statutory Form—Mortgage of "Personal Chattels" and "Trade Machinery" not being "Personal Chattels"—Severance of Security—Partial Invalidity of Deed—Bills of Sale Act, 1882 (45 *&* 46 *Vict. c.* 43), *s.* 9—*Bills of Sale Act,* 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4, 5.

Where personal chattels and other property are mortgaged by a deed which is not made in accordance with the statutory form of a bill of sale, and is therefore, by s. 9 of the Bills of Sale Act, 1882, void as regards the "personal chattels," such deed is valid as to the other property comprised in it, if it is possible to sever the security upon the personal chattels from that upon the other property.

A deed assigned to the grantee as security for a debt "the several chattels and things specifically described" in a schedule to the deed. The schedule comprised "personal chattels," and also a gas engine, which did not come within the definition of "personal chattels" contained in s. 4 of the Bills of Sale Act, 1878. The deed was not made in accordance with the statutory form of bill of sale contained in the schedule to the Bills of Sale Act, 1882:—

Held, that the deed was, under s. 9 of the Bills of Sale Act, 1882, void as to the "personal chattels," but that it remained valid as to the gas engine.

Davies v. *Rees* (17 Q. B. D. 408) explained and distinguished.

APPEAL against an order of a Divisional Court (Cave and A. L. Smith, JJ.), affirming an order of the County Court of

(1) 17 Q. B. D. 484. (2) 17 Q. B. D. 259. (3) 18 Q. B. D. 1.

1888

IN RE BURDETT. EX PARTE BYRNE.

Greenwich, declaring void as against the trustee in the bankruptcy a bill of sale executed by the bankrupt on June 25, 1886, as security for a sum of 200*l.* advanced to him by the appellants, with interest thereon.

The deed contained an assignment by the bankrupt to the appellants of "all and singular the several chattels and things specifically described in the schedule hereto annexed, and now in or about" a certain messuage. The grantor covenanted to pay the 200*l.* and interest by certain instalments. The schedule comprised a number of chattels used by the bankrupt in his business of a printer, and also one ¾-horse power Otto gas engine, with some shafting, belts, and gas fittings and piping. It was admitted that the bill of sale was not in the statutory form, and that it was void as regarded any "personal chattels" comprised in it. The gas engine, shafting, belts, gas fittings, and piping were "trade machinery" of that kind which, by s. 5 of the Bills of Sale Act, 1878, is excluded from the definition of "personal chattels" contained in s. 4 of that Act. The judge of the county court held that s. 9 of the Bills of Sale Act, 1882, made the deed void in toto, and not merely as regarded the "personal chattels" comprised in it. The Divisional Court affirmed the decision of the county court, being of opinion that the case was governed by the decision of the Court of Appeal in *Davies* v. *Rees*. (1) The grantees appealed.

Robson, for the appellants. It is admitted that the deed is void as regards the "personal chattels" comprised in it, but it is contended that it is not void as regards the gas engine and shafting, which are "trade machinery" of that kind which by s. 5 of the Bills of Sale Act, 1878, is not to be deemed to be "personal chattels" within the meaning of the Act. The effect of s. 9 of the Bills of Sale Act, 1882, is to make void a bill of sale given as security for money, unless it is made in accordance with the statutory form, only as regards the "personal chattels" comprised in it. A deed may be good for some purposes, though it is bad for others: *Roberts* v. *Roberts* (2); *Kerrison* v. *Cole* (3);

(1) 17 Q. B. D. 408.

(2) 13 Q. B. D. 794.

(3) 8 East, 231.

1888

IN RE BURDETT. EX PARTE BYRNE.

Davenport v. *Whitmore*. (1) It is a common practice for bankers to take as security for the overdrawn balance of a customer's current account a deposit of his title deeds, together with a memorandum of deposit. In such a case "trade machinery" of the nature of fixtures would pass to the bankers as part of their security by reason of its being annexed to the freehold: *Meux* v. *Jacobs*. (2) But, if the decision of the Divisional Court is right, the security would be avoided in toto, if the memorandum of deposit was not registered as a bill of sale. *In re O'Dwyer* (3) is a decision of the Irish Bankruptcy Court to the contrary. *Davies* v. *Rees* (4), upon which the Divisional Court based their decision, is distinguishable. There it was held that, a bill of sale of "personal chattels" by way of mortgage being void under the Act, the covenant for payment of the mortgage money contained in it was void also. But that was because the statutory form of a bill of sale includes a covenant for payment of the mortgage debt, and this shews that by the term "bill of sale" in the Act is meant an instrument containing such a covenant. The Act avoids only a "bill of sale." In the present case the deed is a "bill of sale," i.e. "an assurance of personal chattels," and something more. It can be severed into two parts. The "bill of sale" is void, but the rest of the security is good.

Reid, Q.C., and *Herbert Reed*, for the trustee in the bankruptcy. There is nothing to shew that there were separate contracts for security upon the chattels and the machinery. The security is entire, and cannot be severed; if it is made void as to the chattels it is void in toto. In some of the cases upon the Bills of Sale Act, 1854, the validity of a bill of sale of fixtures depended upon whether there was or was not a separate assignment of the fixtures: *Ex parte Daglish*. (5) If there is only one contract *Davies* v. *Rees* (4) shews that the Act in avoiding the deed avoids it altogether. The Act of 1882 by s. 4 avoids a bill of sale (except as against the grantee) partially, i.e., in respect of any personal chattels not specifically described in a schedule to the deed, and s. 5 contains a similar partial avoidance in respect of

(1) 2 My. & Cr. 177.
(2) Law Rep. 7 H. L. 481.
(3) 19 Ir. Law Rep. 19.
(4) 17 Q. B. D. 408.
(5) Law Rep. 8 Ch. 1072.

any personal chattels which are specifically described in the schedule, but of which the grantor was not the true owner at the time of the execution of the deed. But s. 9, in avoiding a bill of sale for a departure from the statutory form, avoids it in toto.

[FRY, L.J.:—Every mortgage in fee of trade property would be a bill of sale by reason of there being "trade machinery" annexed to the land, even if the deed did not mention the trade machinery, and if you are right the deed would be void altogether under s. 9. The Act makes "trade machinery," with certain exceptions, "personal chattels" for the purposes of the Act.]

A deed would not become a bill of sale merely because by the grant of the realty trade machinery would pass as being annexed to the realty. The machinery would pass by the grant as fixtures; unless it was separately assigned it would not be within the Act.

The question is, what did the mortgagor grant? "Fixtures," and fixed "trade machinery" pass by operation of law, not by the grant of the land. The legislature did not intend to alter the law laid down by *Meux* v. *Jacobs*. (1) The principle of *Davies* v. *Rees* (2) applies. When a statute avoids a deed it does so in toto, differing in this respect from an avoidance at common law: *Payne* v. *Mayor, &c., of Brecon*. (3) The distinction is pointed out by Willes, J., in *Pickering* v. *Ilfracombe Ry. Co.* (4) In *In re O'Dwyer* (5) it was not necessary to decide the point. The difference between the language of s. 8 and that of s. 9 is very material. Sect. 8 makes a bill of sale for want of registration, &c. void "in respect of the personal chattels comprised therein"; s. 9 simply makes the bill of sale void, i.e., void in toto.

Robson, in reply. The decision in *Payne* v. *Mayor, &c., of Brecon* (6) is in favour of the present appellants.

Cur. adv. vult.

Jan. 30. FRY, L.J., read the judgment of the Court (Lord Esher, M.R., and Fry and Lopes, L.JJ.). After stating the facts, he continued:—

It is admitted, on the one hand, that the instrument does not

(1) Law Rep. 7 H. L. 481.
(2) 17 Q. B. D. 408.
(3) 3 H. & N. 572, 579.
(4) Law Rep. 3 C. P. at p. 250.
(5) 19 Ir. Law Rep. 19.
(6) 3 H. & N. 572.

1888

IN RE BURDETT. EX PARTE BYRNE.

comply with the terms of the Bills of Sale Act, 1882, and, on the other, that amongst the property described in the schedule there are "trade machinery" which are within the exception contained in s. 5 of the Act of 1878, and are, therefore, not "personal chattels" for the purposes of that Act or the Act of 1882.

The deed therefore is plainly void under s. 9 of the Act of 1882 as a bill of sale, so far as regards the "personal chattels." Is it equally void as regards the properties which are not "personal chattels"? The Divisional Court have held that it is. Hence the present appeal.

We will first consider the question upon principle. In our judgment, clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and, when open to question, are to receive a wide or a limited construction according as the one or the other will best effectuate the purpose of the statute (per Turner, L.J., in *Jortin* v. *South Eastern Ry. Co.* (1)) Furthermore, we adopt the language of Willes, J., in *Pickering* v. *Ilfracombe Ry. Co.* (2), where he said: "The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

What, then, was the object and purpose of the legislature in enacting, by s. 9 of the statute of 1882, that all bills of sale not in accordance with the scheduled form should be void? It was to impose certain conditions and terms on instruments by which securities were created on personal property without the transfer of the possession. The legislature were not concerned, and the statute is not concerned, with the borrowing on real estate, or on chattels real, or on chattels excepted from its operation by s. 5, or with the forms of the instruments by which such borrowing may be effected. We ought, therefore, in our opinion, if the language of the statute be open to that construction, to lean towards construing the statute as affecting securities on "personal chattels" only, and not securities on other kinds of property. Now, in our opinion, not only do the words of the statute make this construc-

(1) 6 D. M. & G. at p. 275. (2) Law Rep. 3 C. P. 235, at p. 250.

tion possible, but they lean towards it, for what is avoided is the "bill of sale," and not every instrument, of however complicated or comprehensive a nature, of which a "bill of sale" is part.

But then arises this question, can the illegal part of the security be severed from the legal? In our opinion, the nature of the instrument in question permits such a severance to be made, because a security given on properties A., B., and C., is a security for the whole amount on each of those properties, and on every part of each of them. The excision of one property, in law, by a statute, or, in fact, by an earthquake, effects a separation between the properties, and withdraws that one of them from the operation of the instrument, but leaves the instrument intact and still operative as regards the rest. In our opinion, therefore, the elimination of the "personal chattels" from the security leaves it good as to the machinery, which is not a "chattel" for the purposes of the Bills of Sale Act.

On principle, therefore, we think that the decision of the Court below is not correct.

But that decision proceeds, not on principle, but upon the authority of *Davies* v. *Rees* (1), which was binding on the Divisional Court, and is binding on this Court. In that case this Court decided that, where a bill of sale contained a covenant to pay, and an assignment of chattels personal, and of no other property, and was bad under the statute as an assignment, the covenant to pay was also avoided by the 9th section of the statute. The Court decided that the whole of the instrument there in question was void; not that the whole of every instrument in which a void bill of sale may be embodied is also necessarily void. The principle of that decision we take to be this, that the 9th section made the whole of a "bill of sale," as those words were used in the section, and not merely the assignment contained in it, void, as was shewn by a comparison of language of the 8th and 9th sections; that the same 9th section shewed, by its reference to the schedule, what it meant by a "bill of sale;" and that, on reference to the schedule, it appeared that a covenant to pay was an integral part of the scheduled form, and, therefore, of a "bill of sale" within that section.

(1) 17 Q. B. D. 408.

1888

IN RE BURDETT. EX PARTE BYRNE.

There were three possible areas over which the avoidance might operate, viz. (1) the assignment of chattels only; or (2), everything which appeared as part of a "bill of sale" in the scheduled form; or (3), every part of every instrument in which a "bill of sale" might be contained. The Court rejected the first as too narrow, but did not accept the third, which we think would have been too wide.

For these reasons we are of opinion that the deed in the present case is not avoided by the statute as regards the chattels excepted from the operation of the Act by the 5th section, and that the appeal should be allowed. Each party will pay his own costs in the county court, but the respondent must pay the costs of both appeals.

Appeal allowed.

Solicitor for grantees: *J. H. Burney.*
Solicitors for trustee: *Thomson & Ward.*

W. L. C.

Jan. 20.

[IN THE COURT OF APPEAL.]

IN RE WM. LONG & CO. EX PARTE CUDDEFORD.

Bankruptcy—Petitioning Creditor's Debt—Amount—Judgment Debt—Costs of issuing abortive Execution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6—*Rules of Supreme Court*, 1883, *Order* XLII., *r.* 15.

The costs of an abortive execution cannot be added to the judgment debt for the purpose of making up the amount of debt required by the Bankruptcy Act, 1883, s. 6, to support a bankruptcy petition.

APPEAL by the debtors against a receiving order.

The petitioning creditors by their petition alleged that the debtors were indebted to them "in the aggregate in the sum of 50*l.* 13*s.*, being as to 49*l.* 8*s.*, part thereof, the amount due on a judgment in the Queen's Bench Division, and as to 1*l.* 5*s.*, the balance thereof, the costs of execution on the said judgment."

The execution had proved abortive, because the value of the goods seized was not sufficient to satisfy the claim of the debtor's landlord for rent. It was contended before the registrar that the costs of issuing the execution could not be added to the judgment

debt for the purpose of making up the sum of 50*l.* necessary under s. 6 of the Bankruptcy Act, 1883, to constitute a good petitioning creditor's debt.

The registrar held that the costs could be included, and that, consequently, the petitioning creditors' debt was of sufficient amount.

Channell, Q.C., and *Yelverton*, for the appellant. Payment of the costs of issuing an execution can be obtained only out of the proceeds of that execution, i.e., only when the execution is levied successfully. The costs of issuing one execution cannot be retained out of the proceeds of another execution. The execution debtor is under no personal liability to pay these costs, and they do not constitute a debt due by him: *Marquis of Salisbury* v. *Ray*. (1) That case was decided upon the construction of s. 123, of the Common Law Procedure Act, 1852, but rule 15 of Order XLII. of the Rules of Supreme Court, 1883, is identical with s. 123. *Howes* v. *Young* (2) is distinguishable. It only decided that, for the purposes of s. 87 of the Bankruptcy Act, 1869 (to which s. 46 of the Bankruptcy Act, 1883 corresponds), the sheriff's poundage and officer's fee might be taken into account. At any rate, these costs are only a contingent debt, for they can only be obtained by succeeding in that particular execution. Costs for which an action cannot be brought will not constitute a good petitioning creditor's debt: *Re Miller*. (3) The registrar said that it had been the practice to allow such costs to be included in estimating the amount of a petitioning creditor's debt, but such a practice cannot alter the law.

Herbert Reed, for the petitioning creditors. *Bayley* v. *Potts* (4) seems to shew that the execution debtor is under a personal liability for the costs of execution. The 1*l.* 5*s.* may not be a debt for which an action could be maintained, but it constitutes a liability, like that which is created by an interlocutory order of a Court of Equity for the payment of a sum of money. *Ex parte Liverpool Loan Co.* (5), upon which *Howes* v. *Young* (2) was founded, is in point.

(1) 8 C. B. (N.S.) 193.
(2) 1 Ex. D. 146.
(3) 11 W. R. 374.
(4) 8 A. & E. 272.
(5) Law Rep. 7 Ch. 732.

1888

IN RE LONG. EX PARTE CUDDEFORD.

LORD ESHER, M.R. It seems to me that *Marquis of Salisbury* v. *Ray* (1) is a clear authority that these costs cannot be considered part of the judgment debt, and if so there is nothing to make them "a debt." And that which is not a debt cannot be added to a debt in order to make up the necessary amount of a petitioning creditor's debt.

FRY, L.J. I am of the same opinion. It seems to me that these costs can be recovered only out of a particular fund, viz., the fruits of the particular execution, and that the debtor is under no personal liability for them.

LOPES, L.J., concurred.

Solicitor for appellant: *R. Davies.*
Solicitors for respondents: *Gresham & Davies.*

W. L. C.

Jan. 24.

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

Bankruptcy—Bankruptcy Notice—Final Judgment—Order for Dismissal of Action for want of Prosecution—Order XXVII., *r.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

In an action in the Chancery Division, the defendant obtained under Order XXVII., r. 1, an order for the dismissal of the action for want of prosecution and the payment of the costs by the plaintiff:—

Held, that the order for the payment of the costs was not a "final judgment" within the meaning of s. 4, sub-s. 1 (*g*) of the Bankruptcy Act, 1883, and that the defendant was not entitled to serve the plaintiff with a bankruptcy notice in respect of such order.

APPEAL from a decision of the registrar of the County Court held at Newcastle-on-Tyne dismissing a bankruptcy petition presented by the appellant, the Earl of Strathmore, against the respondent Edward Riddell.

The respondent brought an action against the appellant in the Chancery Division for the recovery of certain estates occupied by the appellant in the counties of Durham and York, and in Scotland, of which the respondent claimed to be the rightful owner. An order was made for the amendment of the statement

(1) 8 C. B. (N.S.) 193.

1888.

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

of claim, on the ground that it was embarrassing. The respondent not having complied with the order, North, J., sitting at chambers, made an order under Order XXVII., r. 1, dismissing the action with costs for want of prosecution. The costs were taxed, and a fi. fa. issued for the amount, to which the sheriff returned "nulla bona." The appellant then served the respondent with a bankruptcy notice, in which he claimed 50*l.* 1*s.* 3*d.* taxed costs under the order of North, J., treating such order as a "final judgment" under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), together with interest and the costs of the execution.

The registrar held that the order was not a "final judgment" within the meaning of the sub-section, and dismissed the petition.

J. Napier Higgins, Q.C., and *Herbert Stephen*, for the appellant. The order was a "final judgment." It was an adjudication upon the question at issue, and it was the last proceeding available in the litigation. "Order" in Order XXVII., r. 1, is a synonym for "judgment." The machinery of the Court of Chancery before the new procedure consisted of "decrees" and "orders," and by 1 & 2 Vict. c. 110, s. 18, "decrees and orders of Courts of Equity" are to have "the effect of judgments in the superior Courts of Common Law," while by s. 5 of the Debtors Act, 1869, a judgment debt is defined as a debt due "in pursuance of any order or judgment of a competent Court." Under the new procedure where a defendant makes default in delivering his defence the plaintiff, under Order XXVII., r. 11, sets down the action on motion for "judgment." Where, as here, the plaintiff makes default in delivering his statement of claim, the defendant applies under Order XXVII., r. 1, for an "order" dismissing the action for want of prosecution. Such "judgments" and "orders" were intended to have the same effect.

If the execution had been made available to the smallest extent, the respondent would have committed an act of bankruptcy. The respondent ought not to be less liable to be made a bankrupt because there was no "seizure and sale."

In *Ex parte Moore, In re Faithfull* (1), the precise point was

(1) 14 Q. B. D. 627.

1888

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

decided in favour of a plaintiff who obtained judgment under Order XXVII., r. 11.

J. Lawson Walton, for the respondent. The order is not a "final judgment." It is not a "judgment" at all, and it could not be pleaded as a bar to another action for the recovery of the same property. Order XXVII., r. 1, by not providing for any "judgment" clearly intends this result. The "order" in question does not decide the point at issue. It merely puts an end to the present action as a matter of procedure. When, as in Order XIV., r. 1, a judgment is intended, the words used are "final judgment." The forms of "judgments" in Appendix F. to the Rules of 1883 always contain the expression "it is adjudged." The forms of "orders" in Appendix K never contain these words. In *Ex parte Moore, In re Faithfull* (1), Lord Selborne defined a "final judgment" as "a final adjudication between the parties on the merits." But here the merits have never been discussed.

[He cited *Ex parte Whinney, In re Sanders* (2); *Ex parte Chinery, In re Chinery* (3); *Ex parte Schmitz, In re Cohen* (4); *Ex parte Orrell Colliery Co.* (5)]

CAVE, J. I am of opinion that this appeal should be dismissed. The question is whether an order dismissing an action for want of prosecution in consequence of the failure of the plaintiff to amend his statement of claim is a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883. I accept the definition of Lord Selborne in *Ex parte Moore, In re Faithfull* (6), "To constitute an order a final judgment nothing more is necessary than that there should be a proper litis contestatio and a final adjudication between the parties to it on the merits." The order in question was made in a case which has not been fought, and in which there has been no adjudication whatever on the merits. No doubt the order is in the nature of a judgment and cannot itself be reopened. But it is no obstacle to a fresh claim by the respondent to the appellant's estates. It is therefore not a "final judgment" within the definition.

(1) 14 Q. B. D. 627.
(2) 13 Q. B. D. 476.
(3) 12 Q. B. D. 342.
(4) 12 Q. B. D. 509.
(5) 12 Ch. D. 681.
(6) 14 Q. B. D. 627, at p. 632.

1888

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

GRANTHAM, J. I am of the same opinion. I base my decision upon *Ex parte Schmitz, In re Cohen* (1), in which it was held that an order for payment of costs was not a "final judgment" within the meaning of this section of the Bankruptcy Act, 1883.

Appeal dismissed.

Solicitors for appellant: *Western & Sons.*
Solicitor for respondent: *Stanford, Newcastle.*

H. D. W.

[IN THE COURT OF APPEAL.]

1887 *Dec.* 17, 20; 1888 *Jan.* 30.

IN RE SMITH. EX PARTE BROWN.

Practice—Judge's Order for Judgment by Consent—Effect of not filing Order in accordance with Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 27—*Payment by Garnishee under void Judgment—Trustee in Bankruptcy, Money received to use of.*

The 27th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), provides that a judge's order for judgment, made by consent of the defendant in a personal action, shall be filed in the manner required by the section within twenty-one days after the making thereof, otherwise the order and any judgment signed or entered up thereon and any execution issued or taken out on such judgment shall be void.

The defendant in an action consented to a judge's order for judgment against him, which was accordingly signed, and, a garnishee order having been made upon the judgment, the garnishee paid the debt attached to the judgment creditors before the expiration of twenty-one days from the date of the making of the judge's order. The order was not filed as required by the above-mentioned section.

The defendant subsequently committed an act of bankruptcy, and was thereupon adjudged bankrupt:—

Held that, although the moneys attached under the judgment had already been paid to the judgment creditors before the act of bankruptcy, nevertheless, the judgment being avoided by failure to file the judge's order, the trustee in bankruptcy was entitled to recover from the judgment creditors the amount paid to them by the garnishee as money received to his use.

In the absence of fraud, the payment by the garnishee discharges him, although the judgment is afterwards set aside.

APPEAL from the decision of Cave, J., sitting in bankruptcy, refusing an application by the trustee of a bankrupt's estate for an order directing the respondents to pay over certain moneys to him.

(1) 12 Q. B. D. 509.

1888

IN RE SMITH. EX PARTE BROWN.

The facts, which are fully stated in the judgment, appear sufficiently from the head-note for the purpose of making the arguments intelligible.

1887. Dec. 17, 20. *Cooper Willis, Q.C.*, and *Sidney Woolf*, for the appellant. The judgment being void by reason of non-compliance with the provisions of s. 27 of the Debtors Act, 1869, the money paid by the garnishee to the judgment creditors was money received by them to the use of the trustee in bankruptcy. It was a debt owing to the bankrupt, and, the garnishee order being founded upon a void judgment, the judgment creditors have no right to such money, but the title thereto became vested and remains in the trustee. The payment under the garnishee order discharges the garnishee, so the trustee could not compel him to pay the debt again, but the payment to the judgment creditors must be taken, upon the avoidance of the judgment, to be money paid to them to the use of the trustee in bankruptcy.

There cannot be any distinction in this respect between proceeds of a fi. fa. which could be recovered by the trustee in bankruptcy, the judgment being void, and money obtained by means of a garnishee order upon a void judgment. It is quite immaterial, having regard to the wording of the section, that the execution is complete or payment made under the judgment before any act of bankruptcy, and before the title of the trustee in bankruptcy accrued. There is no limit of time mentioned in the section within which the judgment and execution must be avoided. The argument that it could not have been intended to avoid an execution completed long before the bankruptcy was urged upon the Court in *Farrow* v. *Mayes* (1), a case which turned on a precisely similar section of the Bankruptcy Act, 1849, but the Court declined to give effect to the argument. The words of the section and the whole course of the legislation in pari materiâ shew that the legislature could not have intended to restrict the effect of avoiding the judgment and execution by any limit of time. (2)

(1) 18 Q. B. 516.

(2) The counsel on both sides referred to and discussed the various sections in successive Acts in pari materiâ, but their arguments are not given in detail, the course of legislation being fully set forth in the judgment.

[LORD ESHER, M.R. The section avoids any execution issued or taken out on the judgment. Can the process of garnishment be considered as an execution for this purpose?]

The garnishee order may not be avoided, so far as regards protection to the garnishee who has paid the debt under it; but the present proceeding is not against the garnishee but the judgment creditors. The section is intended to avoid all modes of execution as against the judgment creditors.

[They also cited *Dimmack* v. *Bowley* (1); *Emmanuel* v. *Bridger* (2); *Bryan* v. *Child* (3); *Govan* v. *Wright.* (4)]

Winslow, Q.C., and *Yate Lee*, for the respondents. The respondents' contention is that the section does not apply to cases where the execution is complete and payment has already been made under the judgment before the title of the trustee in bankruptcy accrues. The judgment is good as against the bankrupt, notwithstanding the failure to comply with the 27th section: *Govan* v. *Wright.* (4) If the right to this money was divested out of the bankrupt before the title of the trustee in bankruptcy arose, then the trustee cannot recover it back. It would be most unjust and inconvenient that, years after the receipt by a judgment creditor of the amount of his judgment, the transaction should be subject to be re-opened because the judge's order had not been filed. The whole object of this and the previous sections in pari materiâ was to give publicity to the transaction, and so to prevent a creditor from having a secret means of getting judgment so as to defeat or prejudice other creditors. In cases where the transaction is complete and the judgment satisfied, the mischief aimed at does not arise. If the payment could be avoided, and the money recovered in the case of a bankruptcy, the same result would follow in the case of a competing creditor, where there was no bankruptcy, and years after the execution was complete another execution creditor could avoid it. Where the execution is complete within the twenty-one days, it seems futile that the judgment creditor should have then to file the order.

Secondly, even assuming that the judgment was void, the amount paid by the garnishee to the judgment creditors cannot

(1) 2 C. B. (N.S.) 542.
(2) Law Rep. 9 Q. B. 286.
(3) 5 Exch. 368.
(4) 18 Q. B. D. 201.

1888

IN RE SMITH. EX PARTE BROWN.

be recovered from them by the trustee. Either the garnishee order was void too, and then the garnishee would not be discharged from the debt, but the trustee could recover the debt from him; or if the garnishee is protected, then the result of the transaction is that, as between the bankrupt and the garnishee, what took place was a payment of the debt and would discharge the garnishee, and the bankrupt could not say that the payment to the judgment creditors was not a payment of the debt to himself, and the trustee in bankruptcy for this purpose is in the same position. There would have been what amounts to a payment of a debt by the bankrupt's debtor to creditors of the bankrupt at the request of the bankrupt, which would amount to payment to the bankrupt, and the trustee in bankruptcy, as representing the bankrupt's estate, could not recover the amount so paid from the judgment creditors.

[FRY, L.J. Would not that involve a fraudulent preference of the judgment creditors?]

The payment could not be a fraudulent preference, because it did not arise from the intention to prefer the judgment creditors but was the result of the garnishee order.

[BOWEN, L.J. But the garnishee order, if reliance must be placed on that, prevents the inference of an agreement by way of accord and satisfaction, or, in other words, of a request by the bankrupt to the garnishee to pay the debt to the judgment creditors.]

The transaction amounted to an equitable assignment of the debt by the bankrupt to the judgment creditors. Payment of a debt by order of a creditor to a third party amounts to payment to the creditor.

Cooper Willis, Q.C., in reply.

Cur. adv. vult.

1888. Jan. 30. The judgment of the Court (Lord Esher, M.R., and Bowen and Fry, L.JJ.) was delivered by

FRY, L.J. The facts which give rise to this appeal are shortly as follows:—On June 17, 1884, Clutton & Hussey issued a writ against the bankrupt Smith claiming the sum of 50,000*l.* On June 18 Smith gave a consent to judgment being entered

against him in the action: and on June 19 judgment was signed accordingly. The consent to this judgment was not filed as required by the 27th section of the Debtors Act, 1869, of which more hereafter. Young owed to Smith a sum of 700*l.* for principal lent and 8*l.* 0*s.* 5*d.* for interest, and on July 5, 1884, the plaintiffs Clutton & Hussey obtained a garnishee order nisi against Young. On July 6 the order was made absolute upon the terms that Young should pay 208*l.* 0*s.* 5*d.* to the plaintiffs on or before August 1 then next, and the balance of the 700*l.* by instalments; and on July 8 the 208*l.* 0*s.* 5*d.* was paid by Young to the plaintiffs. On July 10, 1884, the twenty-one days allowed for filing the consent order under the Debtors Act, 1869, expired. On July 11, 1884, a bankruptcy notice was served on Smith, and in September of the same year a petition was presented on which he was adjudged bankrupt, the act of bankruptcy being non-payment under the notice.

The trustee in bankruptcy now applies that Messrs. Clutton & Hussey may pay to him the 208*l.* 0*s.* 5*d.*

It appears to us that the only claim which the trustee can have against the respondents is on the footing that the money so paid to the plaintiffs was money received by them to the use of the trustee.

Cave, J., refused the trustee's application on the ground that the object of the enactment in question was to prevent rivalry between a judgment creditor by consent and an ordinary judgment creditor, and was not to enable the trustee or a creditor or all the creditors to recover money from a creditor to whom it had actually been paid under a consent judgment. The opposite conclusion he held to be monstrous.

In this view of the learned judge we are not able to concur. We feel, as he did, the inconvenience of the enactment, but we think that the course of decision and of enactment in pari materiâ prevents our giving effect at this time to the argument ab inconvenienti.

It is necessary briefly to recur to the course of legislation on this subject. The first statute which must be referred to is the 3 Geo. 4, c. 39, which was passed, as its preamble shews, to remedy the injustice frequently done to creditors by secret warrants of

1888

IN RE SMITH. EX PARTE BROWN.

FRY, L.J.

attorney to confess judgments for securing the payment of money. It required all such warrants of attorney or a copy of them to be filed within twenty-one days after execution: and, in the event of a commission of bankruptcy after the twenty-one days against the defendant, it declared the warrant of attorney and the judgment and execution thereon fraudulent and void against the assignees in bankruptcy, unless within the twenty-one days after execution one or other of three things had been done, namely, the warrant had been filed, or judgment signed, or execution issued. But the statute not only declared that the warrant of attorney and the judgment and execution thereon were fraudulent and void against the assignees, but enacted that such assignees should be entitled to recover back for the use of the creditors all the moneys levied or effects seized under or by virtue of the judgment and execution.

So far the statute dealt only with warrants of attorney; but by s. 3, after a recital that the object of the previous provision might be defeated by any person giving a cognovit actionem instead of a warrant of attorney to confess judgment, it provided for the filing of every cognovit actionem in any personal action, or a copy of it, within twenty-one days after execution, otherwise such cognovit actionem and any judgment entered up thereon, and any execution taken out on such judgment, should be deemed fraudulent and void against the assignees of the person giving such cognovit actionem under a commission of bankruptcy issued against him after the expiration of the twenty-one days, in like manner as warrants of attorney and judgments and executions thereon are deemed and taken to be fraudulent and void by that Act. As regards a cognovit actionem, the statute contains no express words giving the assignees a right to recover the moneys levied or effects seized, but the intent of the legislature to place a cognovit actionem in the same position as a warrant of attorney is so clear as to make it probable that no distinction could be drawn with success between the two cases. In fact the legislature seems to treat the cause of action accruing to the assignee in bankruptcy as a result of the avoidance of the judgment obtained by consent. This statute contains, it will be observed, no limitation as to the time within which the bankruptcy may occur or

the action of the assignees be brought after the signing of the judgment or the levy of the execution; and the inconveniences which might arise from opening up old transactions under the Act soon attracted attention. Thus in *Wilson* v. *Whitaker* (1) (in 1826), Abbott, C.J., pointed out the great inconveniences which might arise from avoiding an execution which had been perfected, and doubted whether the statute would extend to cases where there had been no act of bankruptcy at the time of giving the warrant of attorney.

Before this doubt was resolved another statute was passed bearing on the same subject, namely, the statute 1 & 2 Vict. c. 110, s. 60, which extended the provisions of the statute of Geo. 4 to assignees in insolvency, and gave them by express language a right of action against persons who had received the moneys levied or effects seized where the warrant of attorney or cognovit actionem had not been duly filed. Under this statute the doubt which had been raised by Abbott, C.J., again arose, and this time it required decision. In the case of *Biffin* v. *Yorke* (2) (in 1843), execution had been issued by the judgment creditor whose cognovit had not been duly filed, and the proceeds paid over to the judgment creditor before the insolvency. The Court felt the inconveniences to which attention has been called, but held the language of the statute too clear and too general to enable them to put any limit of time upon it, and the assignee in insolvency recovered. "It is said," observed Cresswell, J., "that it would be a great hardship if a party could be called upon after several years to refund that which he has honestly recovered: he can, however, be only called upon to refund money which he has recovered under an execution which is pronounced by the legislature to be fraudulent."

The next legislation which it is material to mention is contained in the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), ss. 135, 136, 137. The section with which we are concerned is the 137th. It is obvious that the earlier legislation, whilst dealing with warrants of attorney and cognovits, had not touched consents to judges' orders to sign judgment: and hence a door was opened which the legislature thought it needful to close:

(1) Moo. & M. 8. (2) 5 M. & G. 428.

1888

IN RE SMITH. EX PARTE BROWN.

Fry, L.J.

and accordingly by the 137th section of the statute in question it was enacted that every judge's order made by consent given by a trader (who thereafter became bankrupt) in any personal action, and whereby the plaintiff should be authorized to sign judgment or to issue execution, should, or in certain cases a copy thereof should, be filed within twenty-one days after the making of such order, otherwise such judge's order and any judgment signed or entered up thereon and any execution issued on such judgment should be null and void to all intents and purposes whatever. This clause gave no express right of action to the assignee in bankruptcy.

On this section, again, the same question arose as, under the Insolvency Act, in *Biffin* v. *Yorke* (1), namely, whether it could apply to money paid under an execution prior to the act of bankruptcy. This was in the case of *Farrow* v. *Mayes* (2) (in 1852), where the judge's order not having been filed as required by the Bankruptcy Act, 1849, judgment was signed and execution taken out and a sum paid by the bankrupt's brother, which must be held as a payment under the execution. The assignees under the bankruptcy sued for the recovery of this money, and it was held that they could recover it as money had and received to their use. There the argument was pressed on the Court that the statute was not intended to affect judgments which had been perfected by execution; but the argument was repelled by the judges, who said that the course of legislation made it clear that the enactment was intended to render void all such executions, though executed before the date of the fiat without notice of the act of bankruptcy.

Thus matters stood with regard to consents to judgment down to the year 1869, when the legislature passed three statutes which must be regarded as more or less parts of one scheme of legislation. The first in order of date was the Bankruptcy Act, 1869, the second the Debtors Act, 1869, and the third the Bankruptcy Repeal and Insolvency Court Act, 1869, which repealed, amongst other statutes, the Bankruptcy Act, 1849. The 27th section of the Debtors Act, 1869, deals with consents to judgments, and it is the enactment on which the present inquiry

(1) 5 M. & G. 428. (2) 18 Q. B. 516.

turns. This section provides that, where a judge's order made by consent is given by a defendant in a personal action whereby the plaintiff is authorized to sign judgment, or to issue or to take out execution, then the order, or, in certain cases, a copy of the order, shall, together with certain other documents, be filed as mentioned within twenty-one days after the making of the order, otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment shall be void.

The language avoiding the judgment if the consent has not been duly filed is the same as that of the Bankruptcy Act, 1849, and the clause is equally silent as to the time within which the judgment shall have been signed or execution levied.

The cases of *Biffin* v. *Yorke* (1) and *Farrow* v. *Mayes* (2) clearly apply to this new legislation as they did to the old. The legislature shews no symptom of any desire to alter their effect: and in our opinion those cases were rightly decided and we hold, therefore, that the existing legislation does apply, and gives the assignee in bankruptcy—as regards other creditors or their representatives we need not now inquire—a right to recover, as money had and received, sums raised by execution out of the bankrupt's property.

But these considerations are not enough to solve the difficulties in the present case, because, as we have seen, the money sued for was not money raised by a levy of Smith's goods but money of Young obtained under a garnishee order, a form of procedure as to which it is, to say the least, doubtful whether it can be accurately described as an execution. The question is one of considerable difficulty. The statute, whilst avoiding the judgment, does not avoid any garnishee order obtained upon it, and on general principles and authority we hold it to be clear that in the absence of fraud a payment by a garnishee of the debt due from him to the defendant in the action is a good discharge to him, although the judgment on which the garnishee order was obtained be subsequently set aside, (see *Westoby* v. *Day* (3)); and this conclusion is not in our opinion varied by the fact that the garnishee order

(1) 5 M. & G. 428. (2) 18 Q. B. 516.

(3) 2 E. & B. 605.

1888

IN RE SMITH. EX PARTE BROWN.

FRY, L.J.

gave Young a period within which to make the payment, and that he in fact made the payment before the last day of this period.

But what is the result, if the judgment be set aside and the garnishee order cannot? In our opinion the answer is as follows: when on July 8, Young paid the 208*l.* 0*s.* 5*d.* to Clutton & Hussey he obtained a valid discharge of his debt pro tanto; he paid it to Clutton & Hussey, but to whose use? The judgment was subject to a double contingency: the consent order might still be registered within the twenty-one days: and if so, the payment would be to the use of Clutton & Hussey: or, the judgment might not be registered, but no bankruptcy might take place, and no creditor seek to set aside the judgment: in that case again the payment would be to the use of Clutton & Hussey: or, again, the judgment might not be registered and a bankruptcy might occur; in that event the payment to Clutton & Hussey would be to the use of the trustee in bankruptcy. The payment by Young and the discharge to him cannot be affected by subsequent events, but the use to which the payment is made follows the validity or invalidity of the judgment, and is determined therefore by the contingencies which determine that question. As in the present case the consent was not registered within the twenty-one days, and bankruptcy has supervened, the judgment is void, and the payment made to Clutton & Hussey was made to the use of the trustee of Smith.

No question has been raised as to the competence of the Court of Bankruptcy to determine the issues raised. The proceedings must therefore, we think, be taken to be valid; and the trustee is in our opinion entitled to recover from Clutton & Hussey the 208*l.* 0*s.* 5*d.* The respondents must pay the costs of the proceedings both here and in the Court below.

Appeal allowed.

Solicitors for appellant: *Munns & Longden.*
Solicitors for respondents: *Law, Hussey, & Hulbert.*

E. L.

[IN THE COURT OF APPEAL.]

1887
Dec. 9.

WELDON *v.* MAPLES, TEESDALE & CO., AND OTHERS.

Practice—Appeal—Security for Costs—Abuse of the Process of the Court—Order LVIII., *r.* 15.

The Court of Appeal will order that security be given for the costs of an appeal upon facts which establish a primâ facie case of an abuse, or a threatened abuse, by the appellant of the process of the Court.

ORIGINAL MOTION.

Application by the defendants that the plaintiff should be ordered to give security for the costs of an appeal from the Queen's Bench Division.

The following facts appeared from the affidavit made by one of the defendants :—

In 1883 the plaintiff, a married woman, brought an action against Sir H. De Bathe, and under various orders of the Court the defendant in that action was entitled to costs against the plaintiff, which had been taxed at 126*l.* 16*s.* 5*d.* Besides those costs, the defendant was entitled to the costs (amounting to about 40*l.*) of eighteen applications made by the plaintiff in that action, which applications had been dismissed or no order made upon them. On July 8, 1887, the plaintiff was ordered by the Court of Appeal to give security in the sum of 20*l.* for the defendants' costs in respect of three appeals then pending in the same action.

In 1887 the plaintiff brought an action against her husband and Sir H. De Bathe jointly, which was dismissed as frivolous against both defendants by order of a master in chambers. From this order the plaintiff appealed to a judge at chambers, and to the Divisional Court. Both these appeals were dismissed with costs. The plaintiff having given notice of a further appeal to the Court of Appeal, that Court, on July 8, ordered her to give security in the sum of 10*l.* for the costs of the appeal.

In March, 1887, the plaintiff brought an action against Messrs. Maples, Teesdale & Co., three of their clerks, and Sir H. De Bathe. Messrs. Maples, Teesdale & Co. had acted as the defendant's solicitors in the action of *Weldon* v. *De Bathe*, and the plaintiff claimed damages against them and the other

1887

WELDON v. MAPLES, TEESDALE & CO.

defendants in respect of certain alleged false and libellous statements contained in affidavits made in that action, and also in respect of other alleged false and libellous statements. The action was dismissed as frivolous by the master, and his order was affirmed by a judge at chambers and the Divisional Court, with costs. The defendants' costs were taxed at 26*l.*

The plaintiff had not paid any of the above-mentioned costs, though such as had been taxed and ascertained had been demanded of her; nor had she given security for the costs of her appeals as ordered.

On June 15, 1887, the plaintiff commenced a second action against the same defendants, and the statement of claim was based substantially upon the same causes of action as those stated in her statement of claim in the action commenced in March. The statement of claim in this second action was struck out, and the action dismissed as frivolous by a master. The plaintiff appealed from the master's order, and a judge at chambers affirmed it, and a Divisional Court, on appeal, affirmed the order of the judge. The plaintiff gave notice of appeal from the decision of the Divisional Court, and the defendants now asked for security for the costs of that appeal.

In the affidavit the deponent stated that he was advised and believed that the present appeal was frivolous and vexatious and an abuse of the process of the Court; and he also deposed as follows: "The plaintiff has stated on oath that she is without any settlement and wholly unprovided for, and that she has not the remotest intention of paying costs so as aforesaid found due and ordered to be paid by her to the defendants. She further deposes that she will be made a bankrupt sooner than pay the defendant, Sir H. De Bathe, one shilling, and has stated in open Court that she has not the means to pay the said costs."

John Digby, for the defendants, in support of the application for security, contended that the statements in the affidavit sufficiently shewed that the appellant was unable to pay the costs of the appeal if she failed, though the deponent had not stated in terms that he believed she was without means to pay such costs; and further, that the facts shewed that the appeal was an

abuse, or a threatened abuse, of the process of the Court, and on that ground also security should be ordered.

[He referred to *Harlock* v. *Ashberry* (1); *Usil* v. *Brearley* (2); *Metropolitan Bank* v. *Pooley* (3); *Waddell* v. *Blockey*. (4)]

The plaintiff, in person, submitted that she ought not to be called upon to give security for the costs of her appeal.

Cur. adv. vult.

Dec. 9. BOWEN, L.J. This is a case of some importance, because we are going beyond the ordinary practice—which has been to order that security for the costs of an appeal should be given only upon an affidavit that the appellant had not the means of paying the costs if the appeal was unsuccessful. The affidavit here falls short of stating that. By Order LVIII., r. 15, "such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal." The cases in which security may be ordered are therefore not limited to cases of the poverty of the appellant alone. If there are special circumstances which, in the opinion of the Court, render it just to order security to be given, the order should be made without reference to the appellant's poverty, to which case it was suggested during the argument the operation of rule 15 might be limited. I think that in the present case there is this ground, which constitutes a special circumstance, namely, that a primâ facie case of an abuse of the process of the Court has been made out. I have carefully gone through the affidavit, which states the whole of the facts. I know nothing of the merits of the appellant's case; we have not to decide upon them now. The question to my mind is whether or not she is now abusing the process of the Court and threatening to pay no costs if her appeal is unsuccessful. [The Lord Justice stated the facts as set out in the affidavit.] These facts shew a strong primâ face case of an abuse, or a threatened abuse, of the process of the Court. I say a primâ facie case, because we have not now to consider whether the action is frivolous. Having compared the two statements of

(1) 19 Ch. D. 84.
(2) 3 C. P. D. 206.
(3) 10 App. Cas. 210.
(4) 10 Ch. D. 416.

1887

WELDON v. MAPLES, TEESDALE & CO.

claim, I have come to the conclusion that the appellant's claim is substantially the same as in her former action against the same defendants, which was dismissed as frivolous. Further, the affidavit states that she has declared her intention of not paying any costs if she is unsuccessful. Upon those two sets of facts I apply the powers vested in the Court by Order LVIII., r. 15. I think that there are special circumstances sufficient to justify us in ordering the appellant to give security for the costs of the appeal. At first I was disposed to take the view that before asking for security the respondents ought to have issued execution for the amount of the costs due from the appellant, but upon consideration I do not think that they ought to be driven to such a harsh proceeding as execution before making their application. The appellant must give security to the amount of 10*l.*

LORD ESHER, M.R., and FRY, L.J., concurred.

Application granted.

Solicitors for respondents: *Maples, Teesdale & Co.*

W. A.

1888

Jan. 11, 16, 23.

[IN THE COURT OF APPEAL.]

SHRAPNEL *v.* LAING AND OTHERS.

Practice—Costs—Taxation—Trial with a Jury—Claim and Counter-claim—"Event"—Entry of Judgment—Taxation where Plaintiff succeeds on Claim and Defendant on Counter-claim—Orders XXI., *r.* 17; LXV., *r.* 1.

In an action tried with a jury, where the defendant counter-claims in respect of matters which could not be pleaded as set-off, and the plaintiff recovers a sum on his claim, and the defendant recovers on his counter-claim a sum exceeding that which the plaintiff recovers on his claim, the claim and counter-claim should, for the purpose of taxation of costs, be treated as separate and independent actions, and the costs in each taxed in favour of the successful party, subject to a deduction in respect of the costs of any issues on which he has not succeeded. In such a case it is immaterial, with respect to the taxation of costs, whether the judgment is drawn up in form for the plaintiff for the sum recovered on his claim, and for the defendant for the sum recovered on his counter-claim; or whether judgment is given for the defendant for the balance under Order XXI., r. 17.

Decision of the Queen's Bench Division affirmed.

APPEAL from a decision of the Queen's Bench Division refusing to order a review of taxation of costs.

1888

SHRAPNEL v. LAING.

The action was for damages against the defendants for breach of an agreement whereby they undertook to light by electricity a drill-hall at Sheffield, for the purpose of holding an exhibition. The defendants counter-claimed for the contract price alleged to be due to them from the plaintiff for lighting the hall.

At the trial before Pollock, B., with a jury, a verdict was taken by consent on the claim and counter-claim in the following terms, which were indorsed upon counsel's brief:—

"Verdict by consent for 50*l.* on claim, and for the defendants for 80*l.* on counter-claim. Costs to be taxed according to the ordinary practice upon a trial by jury with such a result. Judgment accordingly."

The judgment, as entered, after reciting the verdict, and that the judge had ordered "that judgment be entered for the plaintiff on the claim for 50*l.*, and for the defendants on the counter-claim for 80*l.*, with costs, to be taxed as in ordinary practice on a trial by jury with such results," adjudged "that the plaintiff recover 50*l.* against the defendants, and that the defendants recover against the plaintiff 80*l.*, and costs to be taxed."

Pollock, B., in chambers, ordered that the plaintiff's costs be taxed on the High Court scale.

A master having taxed the plaintiff's and defendants' costs on the above judgment, the defendants carried in objections to the taxation as follows:—

"The defendants object to the taxation of the plaintiff's costs because the said master (except as to items which he has disallowed) has allowed to the plaintiff all such items as he would have been entitled to if he had a right to the general costs of the action, which the defendants deny his right to.

The defendants also object to the taxation of their own costs because the said master has disallowed to the defendants all such items to the allowance of which they consider that they are entitled as the parties entitled to the general costs of the action, including the costs of the plaintiff's application for costs on the High Court scale."

The master refused to alter the taxation, and made his allocatur for the balance after deducting the amount of the defendants'

1888

SHRAPNEL v. LAING.

costs taxed and allowed from the amount of the plaintiff's costs taxed and allowed.

The defendants took out a summons for a review of taxation, asking "that the allowance of the plaintiff's costs as stated in the objections should be disallowed, and the disallowance of the defendants' costs, as stated in the objections, should be allowed; or that the judgment should be set aside or reformed so as to provide that the 50*l.* recovered by the plaintiff be deducted from the 80*l.* recovered by the defendants, and that the defendants have judgment for 30*l.* with full costs of action to be taxed, the plaintiff to have such costs only as relate to his 50*l.*, and that the master be directed to tax the costs in accordance with such amended judgment."

A judge in chambers having refused to make any order on the summons, the defendants appealed, and a Divisional Court (Stephen and Charles, JJ.) affirmed the judge's order.

The defendants appealed.

H. F. Boyd, for the appellants. The judgment should have been entered for the appellants for the balance after deducting the amount recovered on the claim from the amount recovered on the counter-claim, and the master should have allowed the appellants the general costs of the action. By Order LXV., r. 1, where an action is tried with a jury, the costs shall follow the event unless the judge at the trial for good cause shewn shall otherwise order. The "event" for the present purpose means the result of the litigation taken as a whole apart from the question of costs: *Creen* v. *Wright* (1); *Field* v. *Great Northern Ry. Co.* (2); *Lund* v. *Campbell* (3); though no doubt the word "event" must be read distributively for the purpose of giving the unsuccessful party the costs of the issues on which he has succeeded. By Order XXI., r. 17 (issued in 1883), where there is a balance in favour of the defendant on his counter-claim, judgment may be entered for him for such balance. That rule was intended to make clear what the practice should be. *Lund* v. *Campbell* (3) was decided after the rule came into force, and in that case

(1) 2 C. P. D. 354.

(2) 3 Ex. D. 261.

(3) 14 Q. B. D. 821.

Baines v. *Bromley* (1) was distinguished on the ground that the Court in the former case were not asked to reform the judgment, but only to say whether a taxation had under the particular words of the judgment was proper. *Saner* v. *Bilton* (2), *Mason* v. *Brentini* (3), and *Ward* v. *Morse* (4), were not cases of trial with a jury, and have no application here. It is contended that, construed strictly, the judgment gives costs to the defendant only.

[He also referred to *Ahrbecker* v. *Frost* (5) and *Wight* v. *Shaw*. (6)]

H. Kisch, for the respondent. The judgment was rightly drawn up according to the form of the judgment in *Ward* v. *Morse*. (4) That case and *Baines* v. *Bromley* (1) are, therefore, directly in point in the respondent's favour. On the proper construction of the verdict taken by consent at the trial, and the judgment entered upon it, the parties must be taken to have agreed to the taxation of costs in the mode in which the master has taxed them.

H. F. Boyd, replied.

Cur. adv. vult.

Jan. 23. LORD ESHER, M.R. In this case the defendants moved the Divisional Court for a review of taxation of costs, and the motion was refused. Upon such an application it is necessary that the person who seeks a review should shew that he has taken his objections to the taxation when before the master. The applicant is bound by those objections, and the only question for the Court is whether they are to be sustained or negatived. In all other respects the taxation must be taken to have been right. In the present case there was a claim and what has been termed a counter-claim proper, or pure counter-claim, that is to say—a counter-claim not in respect of matters which could be pleaded as matters of set-off. The case was tried with a jury. The plaintiff succeeded on his claim, and whether or not there were issues of his claim on which he did not succeed, is, I think, immaterial for the purpose of deciding the questions before us. The defendants succeeded on their counter-claim, and it is equally

(1) 6 Q. B. D. 691.
(2) 11 Ch. D. 416.
(3) 15 Ch. D. 287.
(4) 23 Ch. D. 377.
(5) 17 Q. B. D. 606.
(6) 19 Q. B. D. 396.

1888

SHRAPNEL v. LAING.

Lord Esher, M.R.

immaterial whether there were issues of their counter-claim on which they did not succeed. The defendants recovered on their counter-claim a sum larger than the plaintiff recovered on his claim. Upon that state of circumstances judgment was entered according to terms arranged by counsel. During the argument before us a contention was raised as to what was the meaning of that arrangement, and what the meaning of that judgment. It seems to me unnecessary for the purpose of deciding the question of taxation of costs to determine what was the arrangement, or whether this is to be taken to have been an entry of judgment by direction of the judge, or an entry of judgment without any such direction. When the sum recovered on the counter-claim exceeds the sum recovered on the claim, it is, under Order XXI., rule 17, a matter for the discretion of the judge whether judgment shall be entered for the defendant for the balance, or for the plaintiff on the claim and the defendant on the counter-claim. The usual course is, I think, to enter judgment for the balance; but in whichever way the judgment be entered, the rule with respect to taxation of the costs must be the same. The ground upon which the rule is founded is that the claim is a cause of action by itself, and the counter-claim is another and independent cause of action to be treated as if the claim did not exist. Here the claim and counter-claim are to be treated as independent actions founded upon different circumstances, and in respect of independent transactions. That being so, it follows that the taxation of costs must be conducted on the same footing. If so, the costs of the claim are to be taxed as though the claim were an action by itself. If there are issues on the claim, and the plaintiff succeeds on the claim but fails on some of the issues, the taxation gives rise to no difficulty. The costs of the action belong to the plaintiff, but they are to be diminished by the costs of those issues on which he has failed. Then where there is a pure counter-claim, the costs of the counter-claim must be taxed as though it were a wholly independent action. The costs of that action should be given to the defendant, subject to his losing the costs of those issues (if there are any) of the counter-claim on which he has failed. The taxing master will then have two sums with which to deal, the amount

at which the costs of the claim have been taxed, and the amount at which the costs of the counter-claim have been taxed, and his allocatur should be made for the balance. The difficulties which may be suggested as likely to arise are such as any taxing master can easily deal with. Although the claim and counter-claim are to be treated as independent actions, the means of arriving at a conclusion on each may be common to both. Thus if the same counsel appears (as is generally the case now) for the plaintiff both as regards the claim and the counter-claim, and all his instructions are contained in one brief, that brief is treated by the taxing master as two, that is to say, so much of it as relates to the claim and its issues will belong to the claim, and so much of it as relates to the counter-claim and its issues will belong to the counter-claim. In the same way if one fee be marked on the brief it will be treated as two fees. It was suggested in *Baines* v. *Bromley* (1) that where there were items common to both actions the master should divide them. The meaning of the expression "common items" is, items in respect of which both parties get the advantage. There must be very few of such items; it may be doubted whether there are more than two. Perhaps the costs of the writ by which the plaintiff commences his action, and by means of which the defendant is enabled to set up his counter-claim, ought so to be divided, and it may be that whichever party turns out to be in the wrong he ought only to pay half the costs of the writ. It is suggested, too, that the same principle may apply to a summons for interrogatories. It is not, however, necessary to decide those questions to-day, because the only contention in this case was that because the defendants succeeded in recovering more on their counter-claim than the plaintiff recovered on his claim, they ought to have the whole costs of the action, leaving the plaintiff the costs only of the issues upon which he succeeded. In coming to this conclusion I am only following our decision in *Hewitt* v. *Blumer*. (2) The report of the judgment in that case in the Times Law Reports is correct, and the decision is binding upon this Court. I am of opinion, therefore, that this appeal should be dismissed. My decision does not, of course, apply to cases tried without a

(1) 6 Q. B. D. 691. (2) 3 Times Law Reports, 221.

1888

SHRAPNEL v. LAING.

jury, in which the costs are wholly in the discretion of the judge.

Lord Esher, M.R.

FRY, L.J. I am also of opinion that this appeal fails. The defendants' application, as it comes before us, is of a double character. It is an application, first, to reform the judgment as it has been entered, and secondly, to review the taxation. I will consider the judgment as if drawn in the form in which, it is suggested, it ought to have been drawn. I entirely agree that Order XXI., r. 17, gives the Court or a judge a discretionary power to enter judgment for the balance where the defendant has recovered more on his counter-claim than the plaintiff on his claim. But the form of the judgment is immaterial, because this being a trial with a jury costs must follow the event. Where the plaintiff succeeds on his claim and the defendant succeeds on his counter-claim costs follow the event in this way;—the plaintiff is entitled to the costs of the action other than the counter-claim; the defendant is entitled to the costs of the counter-claim. The defendants here have objected that the master was wrong in allowing the plaintiff the general costs of the action, and have contended that they themselves are entitled to them. I think that they are not entitled to them. In my view we need not in the present case give any opinion as to items common both to the claim and counter-claim, or as to the proper apportionment of the costs. Those points do not arise here. I am of opinion that the costs must follow the two events. The result of the action is to give the costs of the action to the plaintiff, and the result of the counter-claim is to give the costs of the counter-claim to the defendants.

LOPES, L.J. I am of opinion that under Order XXI., r. 17, it is entirely within the discretion of the judge who tries the case whether judgment should be entered for the defendant for the balance when the balance is in favour of the defendant. It is, therefore, immaterial, so far as taxation of costs is concerned, whether judgment be entered for the balance, or for the plaintiff for so much as he has recovered on his claim, and for the defendant for so much as he has recovered on his counter-claim. In

1888

SHRAPNEL v. LAING.

Lopes, L.J.

cases like the present the claim and counter-claim are to be treated as independent actions, and the costs of the claim should be given to the plaintiff, and of the counter-claim to the defendant. In my view the defendant cannot be entitled to the general costs of the action. I desire to add that this decision has no application to cases tried without a jury, where the costs are entirely in the discretion of the judge who tries the case. I think that this appeal should be disallowed.

Appeal dismissed.

Solicitors for appellant: *H. F. Kite.*

Solicitors for respondents: *Harding & Co.*

W. A.

IN RE RANKIN. EX PARTE RANKIN.

1887

Dec. 7.

Bankruptcy — Practice—Appeal — Small Bankruptcy —Application for Discharge—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104, *sub-s.* 2, 121, *sub-s.* 3—*Bankruptcy Rules*, 1886, *r.* 273 (6).

Rule 273 (6) of the Bankruptcy Rules, 1886, which provides that in small bankruptcies no appeal shall lie from any order of the Court except by leave of the Court, does not preclude the debtor from appealing, without leave, against a refusal to grant him his discharge.

APPEAL from the County Court of Croydon.

An order had been made for the administration of the debtor's estate in a summary manner under s. 121 of the Bankruptcy Act, 1883. The debtor applied for his discharge, which was refused, and then asked for leave to appeal (1), which was also refused. He then appealed.

Muir Mackenzie, for the Board of Trade. There is a preliminary objection to the hearing of this appeal. Leave to appeal was refused by the judge of the county court, and by r. 273 (6) there is no appeal in small bankruptcies without leave. This rule is

(1) Rule 273 of the Bankruptcy Rules, 1886, provides: "Where an estate is ordered to be administered in a summary manner, under s. 121 of the Act, the provisions of the Act and of these rules shall, subject to any special direction of the Court, be modified as follows, namely":—(6.) No appeal shall lie from any order of the Court, except by leave of the Court.

1887

IN RE RANKIN.
EX PARTE RANKIN.

made under s. 121, sub-s. 3 (1), of the Bankruptcy Act, 1883, and does not modify any provisions relating to the discharge of the debtor. The provisions relating to discharge are found in s. 28, and this rule does not modify any provisions of that section, in taking away the right to appeal without leave given by s. 104. (2) This rule is such as is contemplated by s. 104, sub-s. 2 (*d*), and is valid to limit the right of appeal: *Ex parte Foreman, In re Hann* (3); *Ex parte Dale.* (4)

Herbert Reed, for the petitioning creditor, supported the objection.

Horne Payne, Q.C., and *A. G. McIntyre,* for the debtor, were not called on.

CAVE, J. I am of opinion that this appeal must be heard. By s. 121, sub-s. 3, of the Bankruptcy Act, 1883, it is provided that general rules made under that section are not to modify the provisions of the Act relating to the discharge of the debtor. The provisions relating to the discharge of the debtor are contained in s. 28, coupled with the general right of appeal given by s. 104, sub-s. 2. Does this rule 273 (6) modify that right of appeal? In my opinion it would do so, if it were held to apply to an appeal from a refusal of discharge. The rule, therefore, must be construed not to apply to such an appeal.

A. L. SMITH, J. I am of the same opinion.

Objection overruled.

The Solicitor to the Board of Trade.
Solicitor for creditor: *R. S. Gregson.*
Solicitors for debtor: *Morley & Shirreff.*

(1) Sect. 121, sub-s. 3, provides: "Such other modifications may be made in the provisions of this Act as may be prescribed by general rules with the view of saving expense and simplifying procedure; but nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor."

(2) Sect. 104, sub-s. 2, provides: "Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:—(*d*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal."

(3) 18 Q. B. D. 393.

(4) 33 W. R. 476.

W. A.

IN RE COCK. EX PARTE SHILSON. 1887

Dec. 7, 21.

Bankruptcy—Disclaimer—Bankrupt Lessee—Mortgage by sub-demise—Vesting Order—Exclusion—Application by Lessor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6.

A lessee mortgaged the leasehold property by sub-demise, and was subsequently adjudicated a bankrupt. The trustee obtained leave to disclaim, and thereupon the lessor applied for and obtained an order, under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, that the mortgagee should be excluded from all interest in and security upon the property, unless within seven days he elected to accept an order vesting in him the disclaimed property subject to the same liabilities and obligations as the bankrupt was subject to under the lease:—

Held, that the order excluding the mortgagee's interest unless he accepted the terms proposed could be made upon the application of the lessor.

BY THE COURT:—If the mortgagee refused to accept a vesting order on the terms offered by the order of the Court, it was competent for the Court to order that the property be vested in or delivered to the lessor.

Ex parte Turquand (14 Q. B. D. 405) discussed.

APPEAL from the County Court of Truro.

W. Cock was the lessee of three plots of land under three several leases, and had mortgaged them by sub-demise to one Nankivell, who died in 1886. The appellant Shilson was Nankivell's executor. Cock was adjudicated a bankrupt in 1887. His trustee applied for leave to disclaim and, on the hearing of his application, brought Shilson and the landlord before the Court. Leave to disclaim was granted, and, on the application of the landlord, an order was made that unless Shilson should within seven days elect to accept an order vesting in him the disclaimed property subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in and security upon the property.

Shilson appealed.

Herbert Reed, for the appellant. This order is wrong in any case, because it compels the mortgagee to take all or none of the leases. There are three separate leases, and the mortgagee ought to be allowed to take all or any one or more, at his option. Next, the Court has no power under s. 55, sub-s. 6, to make any such order against a mortgagee by sub-demise, and even if the Court has power to make such an order, it cannot be made upon the application of the landlord. A landlord cannot apply

1887

IN RE COCK. EX PARTE SHILSON.

because he is not a "person claiming any interest in the disclaimed property": *Ex parte Turquand.* (1) This section was only intended to confer a benefit upon persons interested in the disclaimed property, and not to deprive them of any rights. It has been decided that s. 23 of the Bankruptcy Act, 1869, dealing with disclaimer, did not affect the rights of sub-lessees: *Smalley* v. *Hardinge* (2); *Ex parte Walton.* (3) This order destroys the mortgagee's security, because in effect it substitutes a new and different security for his original security. The mortgage was made before the Act of 1883 was passed, and if this order is right the Act lessens the rights which the mortgagee acquired when he made his bargain.

S. Woolf, for the respondent. The question is whether the law is now the same as it was before the Bankruptcy Act, 1883, when the cases of *Smalley* v. *Hardinge* (2) and *Ex parte Walton* (3) were decided. If the law has not been altered then this case is concluded by the decision in those cases. The Act of 1869, as to disclaimer, was very different to the present Act. By s. 23 of the former Act a disclaimer was to be deemed to operate as a surrender, but there was no such provision as is contained in s. 55, sub-s. 6, of the latter Act, which was intended to alter the law as laid down in *Smalley* v. *Hardinge* (2), and has done so clearly and effectually. *Ex parte Turquand* (1) decides that s. 55, sub-s. 6, applies to a mortgagee, and that if he refuses to take a vesting order, whether he applies for it or not, he shall be excluded from all interest in the disclaimed property. The words at the end of sub-s. 6 clearly and expressly do take away rights, and if the mortgagee has suffered any damage he can prove in the bankruptcy: *Re Hinks, Ex parte Verdi* (4); *Morgan* v. *Hardy.* (5)

H. Reed, replied.

Cur. adv. vult.

Dec. 21. The judgment of the Court (Cave and A. L. Smith, JJ.) was read by,

CAVE, J. This is an appeal from an order of the County Court of Cornwall giving the trustee leave to disclaim the bankrupt's

(1) 14 Q. B. D. 405.
(2) 7 Q. B. D. 524.
(3) 17 Ch. D. 746.
(4) 3 Morrell, 218.
(5) 18 Q. B. D. 646.

interest in certain leases, and, on the application of the landlord, ordering that unless the appellant, as executor of Charles Henry Nankivell, a mortgagee by sub-demise of the bankrupt's interest, should within seven days elect to accept an order vesting in him the disclaimed property subject to the same liabilities and obligations as the bankrupt was subject to under the leases, he should be excluded from all interest in, and security upon, the property.

The first point taken for the appellant was that as the leases from the landlord to the bankrupt were separate and independent he ought to be permitted to make his election to take or refuse a vesting order as to all or any as he may see fit. This point, which does not appear to have been brought before the judge of the county court, was at once admitted by Mr. Woolf, who appeared for the respondent, and, if necessary, the order may be amended accordingly.

It was next contended that the Court had no power to make such an order except on the application of the sub-lessee, or at all events not on the application of the landlord. On this point we took time to put our judgment into writing, not on account of any doubt we felt on the point, but because on a subject which is so likely to recur we thought it advisable to lay down a distinct principle in writing for the guidance of the Court in future.

By s. 23 of the Act of 1869 the trustee was entitled to disclaim, among other onerous property, any lease burdened with onerous covenants; and it was provided that on the execution of such disclaimer the property disclaimed should, if the same was a lease, be deemed to have been surrendered on the date of the order of adjudication. It was further enacted that any person interested in any disclaimed property might apply to the Court, and the Court might upon such application order possession of the disclaimed property to be delivered up to him. This section soon gave rise to questions of some difficulty. In *Smalley* v. *Hardinge* (1) it was held by the Court of Appeal that where a lessee sub-lets and afterwards becomes bankrupt and his trustee disclaims, the lessor is not entitled to eject the sub-tenant. In the judgment in that case some expressions are to be found treating

(1) 7 Q. B. D. 524.

1887

IN RE COOK. EX PARTE SHILSON.

Cave, J.

the disclaimer as having the same effect as an actual surrender. When, however, that question subsequently came before the Court of Appeal in *Ex parte Walton, In re Levy* (1), the Court held that the words of the section must be read with some qualification, and that the disclaimer operated as a surrender so far only as was necessary to relieve the bankrupt and his estate and the trustee from liability, and did not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed. The construction of this statute came before the House of Lords in *Hill* v. *East and West India Dock Co.* (2); and the opinion of their Lordships, and especially that of Lord Bramwell, in that case may be referred to as shewing the difficulty felt in putting a construction on the language of s. 23 of the Act of 1869.

That section, however, has been repealed, and the statute of 1883 has, as Lord Cairns said, substituted an enactment of a very different and much more explicit kind upon this part of the bankruptcy law. Sub-sect. 1 of s. 55 enacts in general terms that the trustee may disclaim onerous property of various kinds, including land of any tenure burdened with onerous covenants. Sub-sect. 2 provides that the disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person. Now, there is no doubt that if the section had stopped there it would have been in substance a re-enactment of the corresponding part of the statute of 1869 as explained by the cases already cited.

By sub-s. 6 the Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by the Act in respect of any disclaimed property, make an order for the vesting of the property in, or delivery thereof to, any person entitled thereto, or to whom it may seem just that the same should be delivered by way of

(1) 17 Ch. D. 746. (2) 9 App. Cas. 448.

compensation for such liability as aforesaid, on such terms as the Court thinks just. This sub-section appears intended to apply to all property that may be disclaimed of whatever kind. In *Ex parte Turquand* (1) I expressed a doubt whether the words "person claiming an interest in any disclaimed property" include a landlord. They do of course include persons claiming under the bankrupt; but, on further consideration, we think that they include the lessor also. For instance, if a lessee in possession, who had neither given nor contracted to give any interest to any one else, were to become bankrupt and his trustee were to disclaim, we think the Court would have authority under this section to give possession to the landlord on his application. This view, however, would not dispose of the present case, for there being a sub-lessee the landlord could not under this section, so far as we have yet gone, shew that he was entitled to the disclaimed property. We do not, as at present advised, think that the landlord could apply under this part of the section for an order that the property should be vested in, or delivered to, a person other than himself except in cases where such other person is only a trustee for the landlord. The sub-section, however, provides that where the property disclaimed is of a leasehold nature the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee, or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease when the petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in, and security upon, the property: and if there shall be no person claiming under the bankrupt who is willing to accept an order on such terms, the Court shall have power to vest the bankrupt's estate in the property in any person liable alone, or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt. Now we are clearly of opinion that this provision is of general application in all cases in which an application to disclaim is made, and not only in cases where the sub-lessee, or

(1) 14 Q. B. D. 405.

1887

IN RE COCK. EX PARTE SHILSON.

Cave, J.

mortgagee by demise, applies for a vesting order. This is clearly the opinion of Lord Bramwell, who, in *Hill* v. *East and West India Dock Co.* (1), speaking of this proviso to sub-s. 6, says, "it is noticeable that it gives a great benefit to landlords, doubtless from a sense of their use to the public. Why should a sub-lessee or mortgagee bear the loss occasioned by a lessee's bankruptcy? Why not the landlord?" To this it may be replied, that the benefit is given equally to the lessee, where the bankrupt is an assignee, and to the surety, where there is one, for a bankrupt lessee, and that a mortgagee is not bound to accept a security of this character.

Let us see how the case will work out in practice. A. grants a lease for ninety-nine years at 100*l.* a year to B., who assigns to C., who in consideration of an advance of 2000*l.* demises to D. for the residue of the term, except three days, at a peppercorn. C. becomes bankrupt, and his trustee wishing to disclaim brings A., B., and D. before the Court. A. cannot apply for a vesting order because he is not entitled to the property, nor can B. so long as D. is willing to take a vesting order. B. therefore applies that D. may be put to his election, and if he declines to take a vesting order that he may be excluded, and a vesting order made in favour of him, B. The same thing occurs where C. is the lessee and B. is only a surety for him. Where there is no person liable, either jointly with the bankrupt or alone, to perform the lessee's covenants we are of opinion that, notwithstanding the doubt expressed in *Ex parte Turquand* (2), the landlord may apply that the sub-lessee may be put to his election. If he elects to take a vesting order he gets one. If he declines the landlord may ask for an order excluding the sub-lessee from all interest in and security upon the property, and vesting the property in him, the landlord, discharged from the sub-lease, because, by virtue of the disclaimer and of the exclusion of the sub-lessee he has become the party entitled. This course appears to us to be warranted by the language of the Act, and to carry out its provisions. Until the sub-lessee has declined to take a vesting order the Court has no power to make a vesting order either in favour of the original lessee or of the surety for the bankrupt,

(1) 9 App. Cas. 463. (2) 14 Q. B. D. 405.

if there is one, and, consequently, if the power could only be exercised upon an application by a sub-lessee it would remain a dead letter, for the sub-lessee never would have any interest in making such an application, and the person liable jointly with the bankrupt, or alone, could not get a vesting order until the sub-lessee had declined. Where all the parties are before the Court upon an application for leave to disclaim, the vesting order may at once be offered to the sub-lessee, and on his refusal may be granted to the surety or original lessee, or if there is no person liable alone or jointly with the bankrupt, an order for a vesting order and for delivery of possession, or for a vesting order only, as the circumstances may require, may be made in favour of the lessor. Where no leave to disclaim is required, and consequently the parties interested in the property disclaimed or liable to perform the covenants of the lease are not brought before the Court by the trustee, we are of opinion that the person liable to perform the covenants, or, in the absence of such person, the lessor, may bring the sub-lessee before the Court, and ask for an order for his exclusion and for a vesting order, or for delivery of the property, if the sub-lessee refuses himself to take a vesting order.

For these reasons we are of opinion that the order of the Court below was substantially right, and, subject to a formal amendment making it clear that the appellant is entitled to take all or none or any one or two of the leases, the appeal must be dismissed with costs.

Appeal dismissed; leave to appeal was granted.

Solicitors for appellant: *Coode, Kingdon, & Cotton, for Coode, Shilson, & Co., St. Austell.*

Solicitors for respondent: *Bell, Brodrick & Co., for Bews, Hellard, & Bews, Stonehouse.*

W. A.

1888
Jan. 27.

TOPLEY AND ANOTHER *v.* CORSBIE.
CADYWOLD, CLAIMANT.

Bill of Sale—Validity—Terms agreed to for Maintenance of Security—Covenants necessary for maintaining Security—Power to seize—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict.* c. 43), ss. 7, 9.

The insertion in a bill of sale of terms agreed to by the parties for the maintenance of the security, but which are not necessary for maintaining the security within the meaning of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, does not render the bill of sale void, provided power is not given to the grantee to seize the goods for default in the performance of any covenant or agreement not necessary for maintaining the security.

APPEAL from the County Court at Norwich.

The respondent claimed to be entitled as grantee under a bill of sale to certain chattels which the appellants had taken in execution.

The bill of sale contained a covenant that the grantor would, during the continuance of the security, keep the chattels described in the schedule in good and substantial repair and in perfect working order, and insured against loss or damage by fire in the sum of 58*l.* 6*s.* 3*d.* at the least, and would duly and punctually pay all premiums or moneys necessary for effecting and keeping up the insurance on the first day on which the same ought to be paid, and would on demand produce to the grantee the policy or policies of insurance and the receipt for every payment, and that if default should at any time be made by the grantor in effecting or keeping up such insurance, or in keeping the chattels or any part thereof in good and substantial repair and in perfect working order, it should be lawful for the grantee to insure and keep insured the chattels or any part thereof in any sum not exceeding 58*l.* 6*s.* 3*d.*, to repair and keep in repair the same, and to put the same in perfect working order, and to enter upon the premises on which the chattels might be for the time being for that purpose, and that all moneys expended by the grantee for such purpose, together with interest at the rate of 5*l.* per cent. per annum from the time of the same having been expended, should on demand be repaid to the grantee by the grantor, and until such repayment should be a charge upon the chattels. And it was agreed and declared that upon the happen-

ing of any one or more of the events mentioned in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, it should be lawful for the grantee at any time thereafter to enter and seize the chattels and after the expiration of five clear days from the day on which the chattels should be so seized to sell the same, and out of the proceeds of such sale to pay the expenses incidental to such sale, and the principal sum of 58*l.* 6*s.* 3*d.* and the interest thereon then owing to the grantee on the security, and to pay the surplus (if any) to the grantor. Provided that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882. (1)

The deputy judge held the bill of sale valid, and gave judgment for the claimant.

Beddall, for the execution creditors, in support of the appeal. The bill of sale is invalid. The power given to the grantee to insure the goods in case of default by the grantor, coupled with the provision that the money so expended and interest thereon shall be a charge on the goods, and the power given to the grantee "to put the same in perfect working order," are not necessary for the maintenance of the security within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), and therefore the bill of sale is not made in accordance with the form in the Schedule to the Act, and is void by s. 9: *Bianchi* v. *Offord* (2); *Goldstrom* v. *Tallerman* (3); *Real and Personal Advance Co.* v. *Clears.* (4)

(1) 45 & 46 Vict. c. 43, s. 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:— (1) If the grantor shall make default . . . . in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security."

Sect. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The form in the schedule contains the following words:—

"[*Here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security.*]"

(2) 17 Q. B. D. 484.

(3) 18 Q. B. D. 1.

(4) Ante, p. 304.

1888

TOPLEY v. CORSBIE.

[A. L. SMITH, J., referred to *Furber* v. *Cobb*. (1)]

Gore, for the claimant. The bill of sale is in accordance with the form in the Schedule. There is nothing in s. 9 or in the form about the terms being necessary for the maintenance of the security. The cases already referred to and the decision in *Ex parte Stanford, In re Barber* (2), shew that the question of necessity only arises in considering s. 7, and that it is allowable to agree to terms for the maintenance of the security, which are not necessary for maintaining the security within the meaning of s. 7, provided that a power to seize for default in carrying out such terms is not conferred on the grantee. The insertion of a power to put in working order is a reasonable and necessary precaution against the consequences of a breach of the covenant to keep in repair and in perfect working order. The effect of the bill of sale in *Davis* v. *Burton* (3) was to give power to seize in a case not within s. 7.

Beddall, in reply, referred to *Lyon* v. *Morris*. (4)

MATHEW, J. The appeal must be dismissed. Either the covenant in the bill of sale is necessary for maintaining the security within the meaning of s. 7 of the Act of 1882, or it is not. If it is so necessary, the bill of sale is in exact accordance with the provisions of the Act, and does not offend against its requirements in any respect. If it is not, it is a covenant which the parties have agreed to for the maintenance of the security, within the meaning of the description in the form in the Schedule, but they have carefully avoided inserting a power to seize the goods for default in the performance of this covenant. The decisions in *Bianchi* v. *Offord* (5) and *Real and Personal Advance Co.* v. *Clears* (6) shew that the insertion of such a stipulation does not invalidate a bill of sale where the power to seize is limited to causes for which seizure is permitted by s. 7. In the cases of *Goldstrom* v. *Tallerman* (7) and *Furber* v. *Cobb* (1), which are decisions binding upon this Court, the Court of Appeal dwelt upon the necessity for thus limiting the power to seize, and these

(1) 18 Q. B. D. 494.
(2) 17 Q. B. D. 259.
(3) 11 Q. B. D. 537.
(4) 19 Q. B. D. 139.
(5) 17 Q. B. D. 484.
(6) Ante, p. 304.
(7) 18 Q. B. D. 1.

decisions shew that if the covenant for the maintenance of the security becomes so only by agreement between the parties, the insertion of a power to seize on breach of such proviso vitiates the bill of sale, but the covenant without such a power to seize has not that effect.

A. L. SMITH, J. I am of opinion that the bill of sale is good for these reasons. It is clear from the form in the schedule to the Act of 1882 that the parties may agree to provisions for the maintenance of the security, and if they do so the bill of sale is made in accordance with the form, and does not violate the provisions of the Act. Take the case of a covenant by the grantor not to remove the goods from the premises; this is clearly a provision for the maintenance of the security. Again, a covenant by the grantor to produce receipts for rent, rates, and taxes upon demand is equally clearly a provision for the maintenance of the security. Yet neither of these provisions comes within the terms of s. 7, sub-ss. 3, 4, for in the first case that section gives power to seize only if the removal is fraudulent, and in the second case only if the grantor fails to produce the receipts without reasonable excuse. The Act however permits the insertion of such provisions if the parties agree upon them, and therefore, although they may not come within the terms of s. 7, they do not violate the provisions of the Act, and do not vitiate the bill of sale. Mr. Gore appears to me to have stated the correct view when he suggested that a power to seize for breach of a covenant which is not necessary for maintaining the security violates the provisions of s. 9 because it entitles the grantee to seize for causes not mentioned in s. 7, but however this may be the question as to the effect of such a power is now settled by authority. It is equally well settled that if a provision is agreed upon which is not within the terms of s. 7, and no power is given to seize the goods for a breach of such provision, the bill of sale is not thereby invalidated. This is shewn by *Goldstrom* v. *Tallerman* (1) and *Furber* v. *Cobb* (2), and it is made still more clear by *Bianchi* v. *Offord* (3) and *Real and Personal Advance Co.* v. *Clears* (4), for in both those

(1) 18 Q. B. D. 1.
(2) 18 Q. B. D. 494.
(3) 17 Q. B. D. 484.
(4) Ante, p. 304.

1888

TOPLEY v. CORSBIE.

A. L. Smith, J.

cases there was a covenant that the money expended by the grantee upon repairs should be added to the security, and should be recoverable in the same manner as the principal sum secured, and the bills of sale were held bad on the ground that this gave a power to seize for a cause not included in s. 7. I am of opinion that the power to seize in the present case does not extend to causes other than those included in s. 7, and therefore the bill of sale does not violate the provisions of the Act, and is good.

Appeal dismissed.

Solicitor for appellants: *J. R. Pakeman.*

Solicitor for respondent: *C. F. Martelli, for Turner & Prior, Norwich.*

P. B. H.

Jan. 23.

[IN THE COURT OF APPEAL.]

WILSON *v.* GLOSSOP.

Husband and Wife—Wife living apart from Husband—Necessaries supplied to Wife — Liability of Husband — Adultery of Wife — Connivance by Husband.

In an action against a husband for necessaries supplied to his wife it appeared that the wife had committed adultery with the connivance of her husband, and the husband subsequently turned her out of doors; that she had no means of support; and that the plaintiff supplied her with the necessaries in question while she was living separate from her husband:—

Held, affirming the judgment of the Queen's Bench Division, that the husband was liable.

APPEAL from the judgment of the Court of Queen's Bench (reported 19 Q. B. D. 379).

The action was for 40*l.*, for forty weeks' maintenance of the wife of the defendant, and was tried in the Sheffield County Court without a jury. The facts were as follows: In August, 1885, the defendant charged his wife with adultery, and turned her out of his house without any means of support, whereupon she went to reside with her mother, the plaintiff, who supplied her with board and lodging. The defendant subsequently petitioned for a dissolution of his marriage on the ground of his wife's adultery, and at the trial the jury found that the wife had committed adultery; and that the petitioner had connived at the

adultery committed by her. The petition was thereupon dismissed.

The defence set up to the action for necessaries was the wife's adultery, to which it was answered that the husband's connivance precluded him from relying upon his wife's adultery as a defence. The county court judge gave judgment for the defendant.

The plaintiff appealed to the Queen's Bench Division, who allowed the appeal, and entered judgment for the plaintiff.

The defendant appealed.

1888. Jan. 17. *Moorsom, Q.C.*, for the defendant. The question is whether the wife had implied authority to bind the defendant for necessaries supplied to her: *Manby* v. *Scott.* (1) If the misconduct of the wife was the cause of the separation then there is no such authority: *Cooper* v. *Lloyd* (2); *Rex* v. *Flintan* (3); *Cox* v. *Kitchin.* (4) *Norton* v. *Fazan* (5) was relied on, but Willes, J., explains the ground of that decision in *Cooper* v. *Lloyd* (2), that there was nothing there to shew the tradesman that there had been any alteration in the position of the husband and wife. This conclusion is independent of the consideration whether the husband has behaved badly to her: *Govier* v. *Hancock.* (6) Connivance is a form of misconduct of the husband, but its effect is not different from that of any other misconduct. If the wife had instituted a suit for restitution of conjugal rights, she would not have succeeded, and this shews that the husband cannot be liable to maintain her: *Drew* v. *Drew* (7); *Denniss* v. *Denniss.* (8)

Herbert Reed, for the plaintiff. A husband is only excused from maintaining his wife when she has left him without his consent: *Etherington* v. *Parrot.* (9) If he turns her out of the house for misconduct, he is still liable to support her so long as she is his wife: *Robison* v. *Gosnold.* (10) In this case he is the author of his own wrong and cannot be heard to complain of the adultery he connived at.

(1) 2 Sm. L. C. 9th ed. 466.
(2) 6 C. B. (N.S.) 519.
(3) 1 B. & Ad. 227.
(4) 1 B. & P. 338.
(5) 1 B. & P. 226.
(6) 6 T. R. 603.
(7) 1 Notes of Cases, Ecc. & Mar. 315.
(8) In note to *Turton* v. *Turton*, 3 Hag. Ecc. 348 and 353.
(9) 1 Salk. 118.
(10) 6 Mod. 171.

1888

WILSON v. GLOSSOP.

In a suit for restitution of conjugal rights, no facts are sufficient to bar the proceeding, except such as would be sufficient to have entitled the party to a divorce on an original suit: *Holmes* v. *Holmes.* (1)

Moorsom, Q.C., in reply.

Cur. adv. vult.

Jan. 23. LORD ESHER, M.R. In this case the plaintiff is to be taken to be in the position of a stranger who has supplied things necessary for the maintenance of a married woman living apart from her husband. There were proceedings in the Divorce Court at his suit for a dissolution of marriage on the ground of the wife's adultery, and the jury found that she had committed adultery, but that her husband had connived at it. On this state of facts the Divisional Court decided that he was bound to pay for the sustenance of his wife and gave judgment for the plaintiff. The defendant has appealed.

When a man marries he is bound to keep and maintain his wife, unless she has committed adultery, and further, he is bound in honour to protect her from infamy. This man has done the reverse. The argument for him to exonerate him from liability to maintain his wife would, if it is sound, establish that if he had forced his wife to prostitution and lived on the proceeds of her shame, he might still, whenever he pleased so to do, turn her out of doors for that very adultery, and declare that he was no longer liable for her maintenance. Nothing would induce me to declare that such was the law except a superior authority which would bind me. I do not care to consider whether the wife can under these circumstances claim restitution of conjugal rights. That a husband even after his wife has committed adultery should turn her out without means of support is harsh, but to say that a man who has been an accomplice can do so is degrading. There is not and there could not be a symptom of authority in support of such a proposition. The judgment of the Court below was therefore right, and this appeal is dismissed.

FRY, L.J. If a husband turns away his wife without means of support for any cause not in law justifying such an action she

(1) 2 Lee Ecc. Ca. 116.

1888

WILSON v. GLOSSOP.

Fry, L.J.

carries with her the right to pledge his credit for necessaries. The question then is whether the adultery of the wife with the connivance of her husband is such a justification. On this point there is no direct authority. In my opinion to say that such circumstances justify the husband in turning his wife out of doors would be morally and socially wrong. The husband's act being thus without justification, she carried with her the right to pledge his credit for necessaries. That right she has exercised and he is liable in this action.

LOPES, L.J. The facts of this case are not in dispute, and can be shortly stated. The wife of the defendant committed adultery with his connivance. The husband subsequently turned her out of doors. She had no means of support, and she was supplied with necessaries for her maintenance by the plaintiff, who now seeks to make the defendant liable for the money so expended.

During cohabitation there is a presumption, though a rebuttable one, arising from the circumstances of cohabitation, that the wife is, in certain cases, the agent of her husband and entitled to pledge his credit. But when the wife is living apart from her husband at the time of making the contract the presumption is the other way, and it lies on the creditor to shew that the wife is living apart from her husband under such circumstances as give her an implied authority to bind him. If she is turned away by her husband without any justifiable cause and without the means of supplying herself with necessaries the husband is bound by any contract she makes for necessaries suitable to her degree and estate: per Bayley, J., *Montague* v. *Benedict* (1). Again, in *Eastland* v. *Burchell* (2), Lush, J., says: "The authority of a wife to pledge the credit of her husband is a delegated, not an inherent, authority. If she bind him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere."

(1) 3 B. & C. 635; 2 Sm. L. C. 9th ed. 504. (2) 3 Q. B. D. 432.

1888

WILSON v. GLOSSOP.

Lopes, L.J.

Apply the law so laid down to the present case. A husband who has connived at the adultery of his wife turns her out of doors without the means of providing herself with necessaries—does he not wrongfully compel his wife to leave his home? What right has he to complain of that to which he has been a willing party? And what justification is there for his turning his wife out of doors without the means of supplying herself with necessaries?

Harris v. *Morris* (1), relied on in the Court below, seems to proceed on the ground that the husband's liability revives if he takes the adulteress back into his house, and that if he turns her out again he does so with credit for necessaries. This case does not seem to assist in the decision of the one now before the Court. Lord Kenyon seems to found his judgment on the fact that she was sponte retracta.

I think the judgment of the Court below was right, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Munton & Morris, for Parker & Brailsford, Sheffield.*

Solicitors for defendant: *Hicken, Graham, & Fox, for W. J. Clegg & Sons, Sheffield.*

A. M.

(1) 4 Esp. 41.

THRUSSELL *v.* HANDYSIDE & Co.

1888
Jan. 16, 28.

Negligence—Liability—Work dangerous to other Persons—Duty to take Precautions—Workman compelled to work in Dangerous Place—Knowledge of Danger—Volenti non fit injuria.

The plaintiff was a workman, who was directed by his employer to work in a particular place. The defendants were contractors engaged in work above the place where the plaintiff was working. The defendants' work was of such a nature as to be dangerous to persons working below, unless proper precautions were taken for their safety. The plaintiff was aware of the danger.

The plaintiff, while working where he was directed by his employer, was injured by a piece of iron dropped by the defendants' workmen, and brought an action to recover damages for the injury.

The jury found that the defendants had been guilty of negligence in not taking proper precautions for those below, that there was no contributory negligence on the part of the plaintiff, and that the plaintiff did not voluntarily incur the risk:—

Held, that the case was rightly left to the jury, that, although the plaintiff was aware of the danger, yet, as he was compelled by the orders of his employer to work where he was working when the accident happened, the maxim "Volenti non fit injuria" did not apply, and he was entitled to recover.

Woodley v. *Metropolitan District Ry. Co.* (2 Ex. D. 384) distinguished.

APPEAL from the Westminster County Court.

The action was brought in the High Court of Justice to recover damages for personal injury, and was remitted to the county court under 30 & 31 Vict. c. 142, s. 10, and tried before the county court judge and a jury.

The plaintiff was a carpenter in the employment of Messrs. Lucas, who were the contractors engaged in erecting seats at a large building in Kensington, called Olympia, used for public entertainments. The defendants were the contractors for the ironwork of the roof. On December 13, 1886, workmen in the defendants' employment were working on a stage slung from the roof about 100 feet above the floor of the building, and were riveting iron plates, when one of the plates sprung and struck a piece of iron called a drift out of the hand of the riveter who was holding it. The drift fell on the plaintiff, who was sawing wood below at a place where he had been directed by Messrs.

1888

THRUSSELL v. HANDYSIDE.

Lucas's foreman to work, striking him on the head, and causing serious injury.

The material facts proved at the trial and the findings of the jury are fully stated in the earlier part of the judgment of Hawkins, J.

The verdict was for the plaintiff for 200*l.* damages.

Jan. 16. *Montague Lush*, for the defendants, in support of the appeal. In the first place there was no evidence to be left to the jury of any duty on the part of the defendants to use reasonable care, which would be binding upon them as between them and the plaintiff. This is not like the cases where one person has gone on to the premises of another by invitation, or in consequence of some relation existing between the parties, or where a duty exists to take reasonable care with regard to the public, as, for instance, where a person is lawfully using a highway: *Scott* v. *London and St. Katherine Dock Co.* (1); *Indermaur* v. *Dames* (2); *Collis* v. *Selden* (3); *Kearney* v. *London, Brighton and South Coast Ry. Co.* (4); *Tarry* v. *Ashton* (5); *Pearson* v. *Cox* (6); *Dickson* v. *Reuter's Telegram Co.* (7); *Batchelor* v. *Fortescue.* (8)

Secondly, the accident was caused by the plaintiff's own negligence, or at least such negligence contributed to the result. It is clear that the plaintiff knew there was danger, for he complained, yet he continued to work in the place which he knew to be dangerous.

Thirdly, even if the plaintiff was not guilty of negligence, he voluntarily undertook the risk, so that the case comes within the maxim "Volenti non fit injuria," and the defendants are not liable: *Wiggett* v. *Fox* (9); *Woodley* v. *Metropolitan District Ry. Co.* (10); *Thomas* v. *Quartermaine* (11); *Yarmouth* v. *France.* (12)

Tatlock, for the plaintiff. The case was properly left to the jury, and the plaintiff is entitled to retain the verdict. The

(1) 3 H. & C. 596; 34 L. J. (Ex.) 17, 220.
(2) Law Rep. 1 C. P. 274; Law Rep. 2 C. P. 311.
(3) Law Rep. 3 C. P. 495.
(4) Law Rep. 5 Q. B. 411; Law Rep. 6 Q. B. 759.
(5) 1 Q. B. D. 314.
(6) 2 C. P. D. 369.
(7) 2 C. P. D. 62; 3 C. P. D. 1.
(8) 11 Q. B. D. 474.
(9) 11 Ex. 832; 25 L. J. (Ex.) 188.
(10) 2 Ex. D. 384.
(11) 17 Q. B. D. 414; 18 Q. B. D. 685.
(12) 19 Q. B. D. 647.

maxim "Volenti non fit injuria" has no application. *Yarmouth* v. *France* (1) is a strong authority in the plaintiff's favour, and shews that the question whether he voluntarily undertook the risk was for the jury.

Lush replied.

Cur. adv. vult.

Jan. 28. HAWKINS, J. This action is brought to recover damages for personal injury, which the plaintiff alleges to have been caused by the negligence of the defendants or their servants. The case was remitted to the Westminster County Court under s. 10 of the County Courts Act, 1867, and was tried before the judge of that court and a jury. A verdict was found for the plaintiff for £200 damages, and a motion is now made to set aside that verdict and enter judgment for the defendants, on the grounds that no duty was imposed upon the defendants to protect the plaintiff from dangers which he might encounter in the course of his work, that the plaintiff contributed to the accident by his own negligence, and that the plaintiff took upon himself the risk incidental to his employment, so that the maxim "Volenti non fit injuria" applies.

I am of opinion that the defendants' appeal must be dismissed.

The circumstances were these: some time before the accident a large building in Kensington called Olympia was in course of being prepared for certain public entertainments. The contractors for the iron-work were the defendants; the contractors for the wood-work were Messrs. Lucas. For a considerable time before the day of the accident the defendants' riveters had been engaged in riveting plates, and in order to do this work, and to hoist the plates, a large stage had been erected, which was called a gantry. While this stage was in existence no accident had happened. Rivets did fall, but the stage stopped them and prevented them from falling to the ground, which was about 100 feet below. About a week before the accident there was a considerable pressure of work, as it was important to get the building ready in time for the Christmas holidays, and Messrs. Lucas, who were doing the carpenters' work, required that the stage

(1) 19 Q. B. D. 647.

1888

THRUSSELL v. HANDYSIDE.

Hawkins, J.

should be removed, and after this had been done the defendants' riveters worked on a small stage slung from the roof. Several times during the next week bolts or rivets fell, and one of the bolts which fell was red hot. The people who worked below complained to the defendants' foreman, but no precautions were taken. The staging was not large enough to arrest things that fell, and there was nothing to prevent bolts, rivets, and tools from falling to the ground. It was proved that precautions might have been taken, as by stretching a tarpaulin below the stage on which the riveters worked. In consequence of no such precautions being taken a bolt or drift fell on the plaintiff's head, and inflicted serious injury. The plaintiff was in the employment of Messrs. Lucas, and Messrs. Lucas's contract had nothing to do with the defendants. The plaintiff when he was injured was sawing wood, not directly under the stage from which the drift fell, but about twelve feet out of the perpendicular line. No doubt the plaintiff knew that bolts did sometimes fall, and that they were dangerous; this is shewn by the very fact of his complaining. But no steps were taken to prevent the danger, although the defendants' men knew that the work which they were doing was dangerous, even if they themselves used care, and they knew that precautions might be taken.

The question is whether, on these facts, the plaintiff is entitled to recover.

The jury came to the following conclusions. They were asked whether the accident arose through any negligence on the part of the defendants, whether, if it did, there was any contributory negligence on the part of the plaintiff, and whether the plaintiff voluntarily incurred the risk. They found the defendants guilty of negligence in want of taking proper precautions for those below, that there was no contributory negligence on the part of the plaintiff, and that the plaintiff did not voluntarily incur the risk, and they gave a verdict for the plaintiff for 200*l.*

Mr. Lush in his very able argument contended in the first place that no duty was imposed upon the defendants which could make them responsible for the injury suffered by the plaintiff, even assuming the existence of negligence on the part of the defendants or their servants; secondly, that the plaintiff by his

own negligence contributed to the accident; and, thirdly, that, even if there was no contributory negligence on the part of the plaintiff, still the maxim "Volenti non fit injuria" applied to the case.

My view is this. The rule applicable to this case—I do not say to all cases, for each case must depend on all its circumstances—is that where a man is employed to do certain work, and knows that the work which he is doing is dangerous to others, and that accidents are likely to happen, and knows that other persons are lawfully engaged in other work, and are under an obligation to perform such work, the person engaged in the dangerous work is subject to the duty of using reasonable care, and taking precautions to prevent accidents arising from the work in which he is engaged. The rule is thus stated by Brett, M.R., in *Heaven* v. *Pender* (1): "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." That, in my opinion, is a correct statement of the law. In the present case the defendants' workmen were engaged in dangerous work, for, whether through negligence or accident, it was likely that bolts and rivets would fall. It was obvious to everyone that there was danger, and therefore it is clear that the defendants' workmen were subject to a duty to use reasonable precautions; of this I have no doubt.

The next question is whether there was any evidence for the jury of negligence on the part of the defendants or their servants; I think there was. It is impossible to read the county court judge's notes without coming to the conclusion that the defendants' servants knew that there was danger of bolts falling on the men who were working below. I think the circumstances shew abundant evidence of negligence.

But this does not determine the case, for the plaintiff may fail on one of two grounds, either that he contributed to the accident

(1) 11 Q. B. D. 503, at p. 509.

1888

THRUSSELL v. HANDYSIDE.

Hawkins, J.

by his own negligence, or that the case comes within the maxim "Volenti non fit injuria."

As to the first of these grounds I cannot find any evidence which proves negligence on the part of the plaintiff.

The only remaining question is whether the plaintiff took the risk upon himself, so that the maxim "Volenti non fit injuria" applies. That question, as is shewn by the judgments in *Yarmouth* v. *France* (1), was for the jury. The plaintiff was altogether unconnected with the defendants or their workmen, but was an independent workman employed by Messrs. Lucas, and it is difficult to say, where a man is lawfully working, subject to the orders of his employers, and to the risk of dismissal if he disobeys, that if, after asking for and failing to obtain protection from the danger caused by other people's work, he suffers injury, the maxim "Volenti non fit injuria" applies. It is true that he knows of the danger, but he does not wilfully incur it. "Scienti," as was pointed out in *Thomas* v. *Quartermaine* (2) and in *Yarmouth* v. *France* (3), is not equivalent to "volenti." It cannot be said, where a man is lawfully engaged in work, and is in danger of dismissal if he leaves his work, that he wilfully incurs any risk which he may encounter in the course of such work, and here the plaintiff had asked the defendants' men to take care. It is different where there is no duty to be performed, and a man takes his chance of the danger, for there he voluntarily encounters the risk. If the plaintiff could have gone away from the dangerous place without incurring the risk of losing his means of livelihood, the case might have been different; but he was obliged to be there; his poverty, not his will, consented to incur the danger.

But it is said that there are two cases which support the defendants' contention on this point. The first of these cases is *Thomas* v. *Quartermaine*. (4) It is sufficient to say that the facts there were totally different from those of the present case, for there the plaintiff was serving his master with a full knowledge of the state of the premises on which he was employed.

The other case is *Yarmouth* v. *France* (1), decided by the

(1) 19 Q. B. D. 647.
(2) 18 Q. B. D. at p. 692.
(3) 19 Q. B. D. at p. 659.
(4) 17 Q. B. D. 414; affirmed 18 Q. B. D. 685.

judges of the Court of Appeal, sitting as a Divisional Court, where Lord Esher, M.R., stated the rule as follows: "It seems to me to amount to this, that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim, 'Volenti non fit injuria.' If so, that is a question of fact. . . . I see nothing in the decision in *Thomas* v. *Quartermaine* (1) to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." (2) In the same case Lindley, L.J., said: "If in any case it can be shewn as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it; nor can it, in my opinion, be held that there is no case to submit to a jury on the question whether he has agreed to incur it, or has voluntarily incurred it or not, simply because though he protested he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but on being told to go on went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred." (3)

The case of *Woodley* v. *Metropolitan District Ry. Co.* (4) was relied on by Mr. Lush as an authority in favour of the defendants, and at first sight it looks somewhat like the present case, but when the facts of the two cases are compared there is a clear

(1) 18 Q. B. D. 685.
(2) 19 Q. B. D. at p. 657.
(3) 19 Q. B. D. at p. 661.
(4) 2 Ex. D. 384.

1888

THRUSSELL v. HANDYSIDE.

Hawkins, J.

distinction. The plaintiff in that case was in the employment of a contractor and was injured by a passing train while he was working in a tunnel on the Metropolitan District Railway, and he brought an action against the railway company. It was proved that there was a very small space between the wall of the tunnel and the passing train, but still the space was enough, if a workman was careful, to enable him to stand in safety while a train passed. It is true that the jury found that there was negligence on the part of the company in not having taken precautions for the protection of the workman, but the plaintiff having it in his power to protect himself, and knowing that the danger existed, the majority of the Court of Appeal held that he was not entitled to recover. He was injured not owing to an inevitable cause, but owing to a danger which by the use of proper care he might have avoided. In the present case the plaintiff could not have avoided the danger, unless he had disobeyed the orders of his employers, and incurred the risk of dismissal.

Wiggett v. *Fox* (1) has no bearing on the present case. There the plaintiff's husband was killed by the negligence of a workman in the employment of the defendants, he himself being the servant of a sub-contractor who was employed by the defendants, and the Court held that the two men were in the position of fellow-workmen, and therefore there was an implied contract on the part of the deceased to undertake the risk of the negligence of the other workman. That decision has no application to the present case.

Collis v. *Selden* (2) was a decision on demurrer, and the judgment proceeded on the ground that the declaration set forth no circumstances from which a duty could arise for the breach of which the defendant could be liable to the plaintiff. That again cannot apply here.

The recent case of *Membury* v. *Great Western Ry. Co.* (3), in which a verdict in favour of the plaintiff was upheld by a Divisional Court, is almost identical in principle with the present case.

For these reasons I am of opinion that the question was for

(1) 11 Ex. 832. (2) Law Rep. 3 C. P. 495.
(3) Not yet reported.

the jury, and they have found that the defendants were guilty of negligence in not taking proper precautions, that there was no contributory negligence on the part of the plaintiff, and that he did not voluntarily incur the risk. This verdict must therefore be supported, and the appeal will be dismissed.

GRANTHAM, J. I am of the same opinion. I think a simple statement of the facts is sufficient to shew that the jury have given a right verdict. The plaintiff's work was not dangerous to himself or to others, while the work on which the defendants' workmen were employed were clearly proved to be extremely dangerous to those who were engaged in work below, and it is impossible to come to any other conclusion than that the defendants were bound to take precautions to obviate that danger. The decision in *Thomas* v. *Quartermaine* (1) is not in point, for the question in that case arose between master and servant. In the present case if it had been impossible for the defendants to take precautions against the danger it might perhaps have been suggested that the plaintiff was bound to take his chance, but the evidence shews that the facts were the other way.

Appeal dismissed.

Solicitors for plaintiff: *Watson, Sons & Room.*
Solicitors for defendants: *Stanley & Woodhouse.*

(1) 18 Q. B. D. 685.

P. B. H.

1888
Jan. 26.

In re an Arbitration between GIFFORD and THE BURY TOWN COUNCIL.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *Arbitration under—Appointment of Arbitrators invalid—Their Appointment of Umpire—Award—Rule of Court, Order* LXI., *r.* 15.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180, enacts that "With respect to arbitrations under this Act, the following regulations shall be observed; (1) Every appointment of an arbitrator under this Act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand . . . " "(2) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same."

In an arbitration under the Act one arbitrator was appointed by the local authority under their common seal, and another arbitrator was appointed by the claimant, but not in writing under his hand. The arbitrators disagreed and appointed an umpire who made an award in favour of the claimant:—

Held, that the provisions of the statute not having been complied with, the appointment of the arbitrators and consequently their appointment of the umpire, and his award were invalid, and neither the original submission nor the appointment of the umpire nor the award could be made an order of Court.

Motion to make a submission to arbitration and an award a rule of Court.

It appeared that the corporation of Bury St. Edmunds, in the exercise of their powers as an urban sanitary authority, entered and laid drain pipes in lands of the applicant, who, being injuriously affected thereby, proceeded to arbitration under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180. The corporation duly appointed an arbitrator under their seal. The claimant also appointed an arbitrator, but not in writing under his hand. The arbitrators appointed an umpire, and upon this failure to agree the matter was referred to him. The umpire heard the case and made an award in writing in favour of the claimant for 140*l.* and costs to be paid by the corporation. An application to the officials of the Queen's Bench Division for an order to make the award an order of Court, was refused by them on the ground that as the original submission to arbitration was not in writing they could not make it an order of Court.

Horace J. Browne, in support of the motion. The absence of an original submission in writing is immaterial. By Order LXI.,

r. 15, "no order to make a submission to arbitration, or an award, an order of the Court, . . . shall be passed until the original . . . submission to arbitration, or award, . . . shall have been filed in the central office, . . . and a note thereof made on the judgment or order by the proper officer." The proper course under this rule is to apply for an order making the award of the arbitrator a rule of Court: *Re Rolfe.* (1)

Either the award or the appointment of the umpire might and should be made a rule of Court. [He was stopped.]

Poyser, for the corporation. The reference was under the Public Health Act, 1875 (38 & 39 Vict. c. 55), which has prescribed the mode in which proceedings shall be taken. By s. 180, sub-s. 1, every appointment of an arbitrator under this Act when made on behalf of the local authority, shall be under their common seal, and on behalf of any other party under his hand. By sub-s. 10, before any arbitrator or umpire enters on a reference under this Act he shall make and subscribe a declaration in a certain form. The provisions of the statute as to the appointment of the arbitrator have not been fulfilled. The Court cannot dispense with them. The terms of sub-s. 1 and sub-s. 10 are imperative.

Secondly, the award is bad on the face of it, because it was not made within the time prescribed in sub-s. 9, and the umpire could not extend the time beyond two months from the date of the reference to him, and the Court has no power to enlarge the time: *Kellett* v. *Local Board of Health of Tranmere* (2); *Mackenzie* v. *Ascot Gas Co.* (3) If the award is bad on the face of it, it would be useless to make the submission on which it is founded a rule of Court. Lastly, there is no authority for making an award a rule of Court. The proper course is to make the submission a rule of Court: *Jones* v. *Jones.* (4)

H. J. Browne, in reply. The Act is not mandatory as to every detail of the arbitration proceedings. The parties submitted themselves to the authority of the umpire, and sub-s. 15 makes the award binding on them, "For as by the submission the parties have contracted to do what the arbitrator shall direct, when the

(1) 28 Sol. J. 165.
(2) 34 L. J. (Q.B.) 87.
(3) 17 Q. B. D. 114.
(4) 14 Ch. D. 593.

1888

IN RE GIFFORD AND BURY TOWN COUNCIL.

latter has made his decision, the award is considered in equity as amounting to an agreement by the parties on the terms pointed out by him, and will be enforced against a party as the party's own agreement": Russell on Arbitration, 6th ed., p. 563.

But the application is only that the award may be made a rule of Court, and its validity can be impeached by the local board when proceedings are taken under it. [He also cited *In re Dawdy*. (1)]

A. L. SMITH, J. This is an application to make a submission to arbitration a rule of Court, and, in the alternative, to make the award of an umpire a rule of Court. The question is, whether the claimant makes out that he has such a submission as entitles him to have it made a rule of Court. It appears to me that the arbitration is not an arbitration by consent; it is pursuant to statute. There is a statutory submission, and I think that the provisions of the statute, which are mandatory and not directory, must be complied with. By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180: "With respect to arbitrations under this Act, the following regulations shall be observed; (that is to say,) (1.) Every appointment of an arbitrator under this Act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand." The meaning is that when a corporation appoint an arbitrator they shall appoint by seal and not otherwise, and when any other party to the litigation appoints an arbitrator, the party shall appoint under his hand and not otherwise. The provision seems to me mandatory. Then "(2.) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same." That means every appointment by a corporation under seal, and every appointment by another party under his hand. Can it be argued that the whole of the requirements of this statute may be omitted, and yet that there may be a submission under the statute? It would be frittering away the statute to put such a construction on it. So much for the appointment of the arbitrators. The fact is, the party did not appoint under his hand. By sub-s. 7, "Where there is more than

(1) 15 Q. B. D. 426.

one arbitrator, the arbitrators shall, before they enter on the reference, appoint by writing under their hands an umpire." It is impossible to read that otherwise than as meaning that "where there are more than one arbitrator, the arbitrators"—those appointed under the previous sub-sections, that is to say, under seal and under hand—"shall, before they enter on the reference, appoint by writing under their hands an umpire."

I think that in this case there never was an appointment of two arbitrators pursuant to the statute. If not, how could the two arbitrators named appoint an umpire pursuant to the statute? It seems to me that it is only where two arbitrators are appointed according to the statute that they can appoint an umpire. Here there being one arbitrator lawfully and the other unlawfully appointed, they could not appoint an umpire, so their appointment of the umpire was not legal, because the statute must be the basis of his appointment. I am of opinion that neither the original submission, which is not pursuant to law, nor the appointment of the umpire, which has been relied on as being a submission, can be made a rule of Court.

It has also been pointed out that before the arbitrator enters on his duties he shall make a statutory declaration. It appears that the arbitrator appointed by the claimant never made that declaration. Another observation on these sections is that s. 2 shews what the submission is to be. By s. 14, any submission "under the provisions of this Act" may be made a rule of Court. That means a joint appointment under seal and under hand shall be made a rule of Court. I think this application ought not to be granted.

Next as to the award. It is said that under Order LXI., r. 15, this award ought to be made a rule of Court. Within the phraseology of that rule it is possible to make an award a rule of Court. In my experience I have never known awards made a rule of Court, but only submissions. But I find that it was the old practice in Chancery to make an award a rule of Court. In *Jones* v. *Jones* (1), however, Jessel, M.R., said, "In cases of submission to arbitration it was usual in the Court of Chancery to make the

(1) 14 Ch. D. 593, at p. 594–5.

1888

IN RE GIFFORD AND BURY TOWN COUNCIL.

A. L. Smith, J.

award an order of Court: Seton on Decrees, 4th ed. p. 403. Consol. Order XXIII., r. 23. But as it is important that under the Judicature Acts the practice of all the Courts should be as far as possible uniform, I have ruled in my Court that the proper course is to make the submission a rule of Court, according to the practice of the Common Law Divisions," which I know has been uniform up to this time. It is said that we ought to make the award a rule of Court. But if I am right in my opinion that the statute is binding on the arbitrators the award cannot be enforced, and it is no use making it a rule of Court, and I decline to do so, and see no harm in not doing so.

CHARLES, J. I am of the same opinion. It has been suggested that we should treat this as an arbitration by consent. I do not think it is possible for us to do so. It seems to me to be an arbitration under the Public Health Act, 1875, and in order to decide whether we ought or ought not to grant the application it is necessary to see whether the provisions of s. 180 have or have not been properly pursued. Is it essential to the validity of the subsequent proceedings that the appointment by the party shall be under his hand? It has been argued that the provision in sub-s. 1 is directory and not imperative. I cannot take that view. I think it is essential to the validity of the appointment of the arbitrator that it shall be under the hand of the individual appointing him, and I am fortified in my opinion that it should be in writing by sub-s. 2 saying that it shall be delivered to the arbitrators. I think the original submission cannot be made a rule of Court. Then it is suggested that we can make the appointment of an umpire by the two alleged arbitrators a rule of Court. I do not think we can do so. Sub-sect. 7 provides that the arbitrators shall appoint an umpire. It is said that as there is here an appointment in writing under the hand of each arbitrator, sanctioned in each case by the parties in litigation, that appointment may be treated as a submission which can be made a rule of Court. The answer is that the appointment must be by arbitrators. But we must see if they are what they profess to be, viz., arbitrators under the statute. One of the alleged arbitrators was not an arbitrator under the

statute, so I think that the appointment could not be upheld. Therefore I do not think we can make the appointment of the umpire a rule of Court. Lastly, we are asked to make the award a rule of Court. I agree with my learned Brother that if there is an infirmity in the appointment of the arbitrator we cannot do so. By sub-s. 15, "The award of arbitrators or of an umpire *under this Act* shall be final and binding on all parties to the reference." But I come to the conclusion that it was not an arbitration under the Act. I think we ought not to make the appointment of the umpire nor the award a rule of Court. Order LXI., r. 15, does contemplate making an award in some cases a rule of Court, but my experience, like that of my learned Brother, is that an award, as contra-distinguished from a submission, has never been made a rule of Court. At all events, whether we could or could not make the order applied for, we ought not to do it in the present case.

Motion dismissed.

Solicitors for claimant: *Paterson, Snow, Bloxam & Kinder.*
Solicitor for local board: *Gilbert Robins.*

J. R.

1887

Dec. 21.

FRIEND *v.* SHAW.

County Court—Jurisdiction—Landlord and Tenant—Ejectment—Determination of Tenancy—"Legal Notice to Quit"—County Courts Act, 1856 (19 & 20 *Vict. c.* 108), *s.* 50.

By s. 50 of the County Courts Act, 1856, jurisdiction in ejectment is given to the county courts in cases where neither the rent nor the value of the premises exceeds 50*l.* a year, and the tenant's term and interest "shall have expired, or shall have been determined either by the landlord or the tenant by a legal notice to quit."

The plaintiff let to the defendant a house for three years at a rent of 3*l.* 6*s.* 8*d.* a month, payable monthly; the agreement of tenancy contained a power of re-entry on non-payment of any part of the rent for twenty-one days after the day of payment, or in case of the breach or non-performance of any of the conditions in the agreement. A month's rent having been in arrear for more than twenty-one days, the plaintiff gave the defendant notice to quit at the end of the next month of the term, alleging as breaches non-payment of rent and a breach of a condition in the agreement:—

Held, that a "legal notice to quit" must be taken to mean the notice to quit required by law and not one depending on the express stipulation of the parties; that the tenancy had not, therefore, been determined within the meaning of the section, and that an action to recover possession of the premises could not be brought in the county court.

Semble, that the jurisdiction of the county court under s. 50 of the County Courts Act, 1856, is confined to tenancies from year to year.

Appeal from the Greenwich County Court.

The action was brought to recover possession of a house of which the defendant was tenant to the plaintiff, and for mesne profits.

By an agreement, dated June 8, 1886, the plaintiff agreed to let to the defendant for three years from June 24, 1886, and no longer, a house at the rent of 3*l.* 6*s.* 8*d.* per month, payable monthly on the 24th of every month. The agreement provided (inter alia) that the tenant should not make any alteration in the premises without the licence in writing of the landlord, and also contained a power of re-entry in the usual form on non-payment of any part of the rent for twenty-one days after the day of payment, or in case of the breach or non-performance by the tenant of any of the conditions or stipulations in the agreement. On March 19, 1887, the plaintiff gave the defendant notice to quit on April 24, alleging as breaches an alteration in the premises without

licence in writing, and non-payment of the month's rent due on February 24. The defendant refused to give up possession.

At the trial the defendant objected to the jurisdiction of the county court judge, but the objection was overruled and judgment given for the plaintiff. The defendant appealed.

Cavanagh, for the defendant. The county court judge had no jurisdiction to try the case, the tenancy not having been determined by a legal notice to quit within the meaning of s. 50 of the County Courts Act, 1856. (1) The policy of the legislature in passing this section was to enable the landlord to recover possession by action in the county court in a clear case, where it was obvious that there could be no defence to an action of ejectment in the superior court; and the section would be applicable to the case of the expiration of a tenancy by effluxion of time, or to its determination by a notice known to and recognised by the law, but not to a case of forfeiture.

By the repealed Act, 1 Geo. 4, c. 87, s. 1, a speedy mode of recovery of lands and tenements was given in cases where the term or interest of the tenant had expired or been determined by "regular" notice to quit; and this was held not to apply where a lessee held over after notice to quit given by himself, his tenancy not having expired by effluxion of time: *Doe* d. *Cardigan* v. *Roe* (2); nor where the term, not having expired by lapse of time, had been surrendered: *Doe* d. *Tindal* v. *Roe* (3); nor where before expiration the lessor claimed a right of re-entry for non-performance of the covenants of the lease: *Doe* d. *Cundey* v. *Sharpley*. (4) The expression "legal" notice in s. 50 of the County Courts Act, 1856, is stronger and more restrictive than "regular" notice in the former Act. The case of *Barlow* v.

(1) By s. 50 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), jurisdiction is given to the county court in cases "when the term and interest of the tenant of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof shall have exceeded fifty pounds by the year, and upon which no fine or premium shall have been paid, shall have expired, or shall have been determined either by the landlord or the tenant by a legal notice to quit, and such tenant, or any person claiming by, through, or under him, shall neglect or refuse to deliver up possession accordingly."

(2) 1 D. & R. 540.

(3) 2 B. & Ad. 922.

(4) 15 M. & W. 558.

1887

FRIEND v. SHAW.

Teal (1), which turned on the meaning of the words "where a half-year's notice is 'by law' necessary" in the Agricultural Holdings Act, 1883, is a conclusive modern authority in favour of the defendant.

[He also cited *Doe* d. *Carter* v. *Roe.* (2)]

Erichsen, for the plaintiff. The county court judge had power to inquire whether the tenancy was determined by a legal notice to quit; his decision on that question is conclusive: *Fearon* v. *Norvall.* (3) The words "legal notice" do not bear a restricted meaning; they include any notice which is not contrary to law. A decision in favour of the defendant on this preliminary point will have the effect of ousting the jurisdiction of the county court in all actions where there is an agreement of any kind between the landlord and tenant.

WILLS, J. I am of opinion that this objection must prevail. It is clear that the consent of the parties to give the county court judge jurisdiction, provided for by s. 25 of the County Courts Act, 1856, was not given in this case. The contention on behalf of the plaintiff that the determination of a question of fact determines the jurisdiction, and that a county court judge who has given himself jurisdiction by determining the fact cannot be prohibited, has here no application; this is not a motion for a prohibition, but an appeal under a statute which gives an appeal on questions of law arising on the hearing, and which enables us to pronounce the judgment that ought to have been pronounced by the learned county court judge. The objection to his jurisdiction was indeed one which he had to determine, but we should, as a matter of law, have decided it in a different way from that in which he decided it, and we must therefore alter his judgment, it being perfectly clear that the appeal has been properly initiated and prosecuted.

Is this, then, a case which falls within the County Courts Act, 1856? I think not. The jurisdiction given by that Act to the county courts in actions of ejectment can only arise in cases where the rent does not exceed 50*l.*; here the rent is less than

(1) 15 Q. B. D. 403. (2) 10 M. & W. 670.
(3) 5 D. & L. 439.

that amount, and so far the case is within the Act. But a further limitation is imposed upon the jurisdiction of the county court, which by s. 50 is confined to cases where the term and interest of the tenant has expired (which clearly means by effluxion of time), or has been determined either by landlord or tenant by a legal notice to quit. The words of the section are significant; it is not *any* notice to quit, but a "legal" notice which is requisite, and if no such legal notice has been given, the tenancy has not been determined by legal notice. The word "legal" must exercise a restrictive force upon the expression "notice to quit." The phraseology was taken from the repealed Act, 1 Geo. 4, c. 87, s. 1, the provision for a "regular" notice to quit in the earlier being altered to one for a "legal" notice to quit in the later statute. It has been held in cases arising under the earlier Act that a notice given by virtue of a power contained in a lease did not satisfy the words of the section, and it seems to me impossible to suppose that the framers of the Act of 1856 had not the previous decisions in their minds. In that Act we find the expression "legal," which to my mind is stronger than "regular" notice. This case is therefore, in my opinion, not merely practically governed by the cases decided under the older Act, but is rendered still clearer by the fact that after those decisions the legislature used language which still further qualified the jurisdiction of the county courts by substituting "legal" for "regular."

What, then, is the meaning of a "legal notice to quit?" I think it means a notice where, certain circumstances having been established, the nature and character of the notice to quit follow as matter of law from the state of the facts. It may be that if we adopt such a definition, the jurisdiction in ejectment of the county courts under this section would be practically confined to tenancies from year to year, but that was, I think, precisely what the legislature intended: they did not mean to give the county courts jurisdiction where questions of title were involved, but only in clear cases where there was a determination of a term, such determination being effected in some way known to and provided for by the law and not subject to the contractual regulation of the parties. Then there is the further authority of *Barlow* v. *Teal* (1),

(1) 15 Q. B. D. 403.

1887

FRIEND v. SHAW.

Wills, J.

which decides that s. 33 of the Agricultural Holdings Act, 1883, in speaking of a notice "by law necessary," contemplates a notice established by law and not depending on the contractual engagements of the parties to an agreement. For these reasons I think that our decision is in harmony with previous legislation and judicial interpretation, and also with legislation subsequent to the Act which we are now considering.

GRANTHAM, J., concurred.

Appeal allowed.

Solicitors for plaintiff: *Lucas & Sons.*
Solicitor for defendant: *J. Cooper Scard.*

W. J. B.

1888
Jan. 19.

[IN THE COURT OF APPEAL.]

EATON *v.* LAKE.

Copyright—Musical Composition—Right of Representation—Absence of Consent in writing by Author—"Contrary to right of author"—3 & 4 Wm. 4, c. 15, ss. 1, 2—5 & 6 Vict. c. 45, ss. 20, 21.

By 3 & 4 Wm. 4, c. 15, ss. 1 and 2, it is in substance provided that the author of any dramatic piece or entertainment, or the assignee of such author, shall have, as his own property, the sole liberty of representing such production, or causing it to be represented, at any place of dramatic entertainment during certain periods mentioned in the Act, and shall be deemed the sole proprietor thereof, and that, if any person shall, during the continuance of such sole liberty as aforesaid, "contrary to the intent of this Act, or right of the author or his assignee," represent such production, or cause it to be represented, without the consent in writing of the author or other proprietor, at any place of dramatic entertainment, every such offender shall be liable for each and every such representation (among other alternatives) to the payment of an amount not less than 40*s.* to the author or other proprietor. By 5 & 6 Vict. c. 45, ss. 20 and 21, the above provisions are extended to musical compositions, and it is provided that the sole liberty of representing dramatic pieces and musical compositions shall endure and be the property of the author and his assigns for the term in the Act provided for the duration of copyright in books.

The plaintiff was employed by the defendant, the proprietor of a music-hall, as the conductor of the orchestra, at a weekly salary, and had been in the habit of composing the music for ballets performed there, receiving payments of varying amounts from the defendant in respect of such compositions. The plaintiff composed the music for a Christmas ballet, to be performed at the defendant's music-hall, but while the piece was running he threw up his engagement as conductor, and took away the musical score and band-parts necessary for the performance of the music. It was subsequently arranged orally

between the plaintiff and the defendant that the plaintiff should give up the score and band-parts to the defendant in consideration of a payment of 20*l.* by the defendant. The defendant afterwards continued to perform the piece with the plaintiff's music, and the plaintiff brought an action to recover penalties in respect of such subsequent performances. The jury found that the music composed for the ballet by the plaintiff was a substantial, independent, musical composition, and that the plaintiff had not sold his rights therein to the defendant:—

Held, that, in the absence of any assignment or consent to the representation of the composition in writing given by the plaintiff, the performances were contrary to the right of the author, and the action was maintainable.

Shepherd v. *Conquest* (17 C. B. 427) followed.

APPEAL from the order of the Queen's Bench Division (Stephen and Charles, JJ.), setting aside the judgment entered for the plaintiff at the trial, and entering judgment for the defendant.

The facts were as follows: The action was to recover penalties from the defendant under 3 & 4 Wm. 4, c. 15, ss. 1, 2, and 5 & 6 Vict. c. 45, ss. 20, 21, for representing on certain days a musical composition, of which the plaintiff was the author and proprietor, without the plaintiff's consent in writing.

The defendant was the proprietor of a music-hall. He had for many years employed the plaintiff as conductor of the orchestra in such music-hall at a weekly salary. The plaintiff had been in the habit of composing the music for ballets performed there, receiving payments of varying amounts in respect of such compositions, in most cases after the run of the piece was completed. The plaintiff had composed the music for a ballet brought out by the defendant at Christmas, 1886, and had conducted at the first performance of the piece on December 24. On December 27, he gave the defendant a week's notice to terminate his engagement as conductor. On the next day he left his situation, taking away the musical score and band parts of the music. On the same day the defendant had an interview with him, and it was arranged between them orally that he should give up the score and band-parts, which were necessary for the performance of the piece, in consideration of a payment of 20*l.* by the defendant. (1)

(1) It appeared that the plaintiff never received the money, a cheque having been given for it, but stopped by the defendant, on the ground apparently that it was obtained by duress, but it is conceived that this is not really material.

1888

EATON v. LAKE.

The defendant subsequently continuing the performances of the piece with the plaintiff's music, the plaintiff brought the action against him to recover penalties for such subsequent performances.

It appeared that no written agreement or arrangement with regard to the composition by the plaintiff of the music or its performance had ever been made by the plaintiff. Upon the evidence given at the trial as to the nature of the composition and the circumstances of the transaction between the plaintiff and the defendant, the learned judge, Grantham, J., asked the jury two questions: first, whether the music composed by the plaintiff was a substantial, independent, musical composition, and secondly, whether the plaintiff acted in composing it as the defendant's agent. The jury answered the first question in the affirmative. They gave no answer in terms to the second question, but found that the plaintiff had not sold his rights in such composition to the defendant. On those findings the learned judge gave judgment for the plaintiff for the penalties claimed, but, as before stated, the Divisional Court set such judgment aside on the ground that the performances had not been contrary to the right of the author.

Fillan, for the plaintiff. The jury having found in effect that this was a substantial, independent, musical composition, of which the plaintiff was the author, by virtue of the provisions of 3 & 4 Wm. 4, c. 15, ss, 1, 2, and those of 5 & 6 Vict. c. 45, ss. 20, 21, the plaintiff was the proprietor of the copyright and right of representation; and, in the absence of an assignment in writing or of any consent in writing to the performance of the piece given by the plaintiff, the defendant is liable to the penalties claimed.

[FRY, L.J. The performance must be "contrary to the right of the author" in order to render the defendant subject to the penalty.]

It is contended that it is contrary to the right of the author, where there is no consent in writing. To hold otherwise would be to nullify the provision of the 2nd section of 3 & 4 Wm. 4, c. 15, which requires the consent to be in writing.

[He cited *Shepherd* v. *Conquest* (1); *Wallerstein* v. *Herbert* (2); *Leyland* v. *Stewart* (3); 5 & 6 Vict. c. 45, s. 18.]

J. Lawson Walton, for the defendant. The question is whether the plaintiff is entitled under the circumstances to bring an action for penalties for the performance of this piece of music as being "contrary to his right." The judgment in *Shepherd* v. *Conquest* (1) leaves open the question whether there may not be some circumstances under which the copyright in a literary work or the right of representation would, from the inception of its existence, become vested in an employer other than the person who actually composed it. The plaintiff composed this music in the course of his employment as conductor.

[LORD ESHER, M.R. The evidence does not shew that; on the contrary, he was paid for such compositions varying sums in addition to his salary.]

The music was composed by him for the express purpose of being performed, and it was inherent in its nature that it should be performed, as a mere adjunct of the ballet entertainment which the defendant was getting up, and which involved other elements, such as dancing and scenery; it was a subordinate part of a whole. The case therefore comes within the authority of *Hatton* v. *Kean* (4), which establishes an exception to the doctrine of *Shepherd* v. *Conquest*. (1)

[LORD ESHER, M.R. The jury on the evidence have found this to be a substantial, independent, musical composition, and there has been no application to set aside their finding. Would not an opera be an independent musical composition, although it is intended to be performed in conjunction with a libretto and scenery? Assuming the facts alleged by the plea in *Hatton* v. *Kean* (4) to be true, a jury could not have found on those facts that the composition was an independent composition.]

The performance of the music was not "contrary to the plaintiff's right," for by virtue of the original understanding on which the piece was composed, or, at any rate, by what took place at his interview with the defendant, he clearly assented to such performance.

(1) 17 C. B. 427.
(2) 16 L. T. 453.
(3) 4 Ch. D. 419.
(4) 7 C. B. (N.S.) 268.

1888

EATON v. LAKE.

The plaintiff is estopped from bringing this action by his conduct. He stood by while the defendant incurred expenses by engaging performers and procuring scenery for the performance of this ballet.

[FRY, L.J. What is the estoppel? An estoppel of this sort is where a person is prevented from asserting a fact because he has led another to believe the contrary. What is the fact here, the contrary of which the plaintiff has led the defendant to believe? It is impossible to assert that he led the defendant to believe that there was a consent in writing to the performances.]

It is a reasonable inference that he led the defendant to believe that the music was not in the nature of an independent composition, of which he claimed to be the sole author, but only a subordinate part of the whole entertainment which the defendant was getting up.

Fillan, was not called upon to reply.

LORD ESHER, M.R. In this case the finding of the jury, which stands unchallenged, is to the effect that this was a substantial, independent, musical composition, of which the plaintiff was the sole author. There was evidence, I think, and perhaps strong evidence, for the jury, if it were material, that the plaintiff had made an agreement with the defendant that he should allow the defendant to represent this composition, the defendant paying him for so doing. For some reason or other the question whether that was so was not in terms left to the jury, but I do not think it was necessary that it should be left to them, for it appears to me that, if the jury had so found, it would have been a wholly immaterial finding. Assuming that the plaintiff did agree with the defendant that he would compose this piece of music, and that the defendant might then represent it on the terms that the defendant would pay the plaintiff for it, nevertheless, unless the agreement was in writing, so as to come within the terms of the Act, the plaintiff, as the sole author of an independent composition, must be deemed to be the sole proprietor of the right of representing such composition, and the defendant could not rely on the agreement as entitling him to represent it. That appears to me to be the law on the subject by virtue of the construction

which has been put upon the Act. If we had to ascertain de novo the proper construction to be put on the Act, it would be necessary carefully to consider its language, but the true construction of the Act was determined in the year 1856 by the Court of Common Pleas, in the case of *Shepherd* v. *Conquest*. (1) The circumstances under which that decision was arrived at are very striking. The case was tried by Jervis, C.J., who seems at the trial to have thought the construction, which he afterwards felt obliged to put on the Act, too rigid, and to have held that, if there was such an agreement as I have mentioned, that would entitle the plaintiffs to maintain the action; but, when the case came before the Court, he, sitting with other judges on appeal from what he did at nisi prius, came to the conclusion, after hearing the arguments, that he had decided wrongly at nisi prius, and that the true construction of the Act was what I have stated. In giving judgment he said that it was contended for the plaintiffs that, under the circumstances, the author was to be considered as merely their servant, the produce of whose labour became the property of his masters at the moment of production, so that no assignment was necessary to vest the property in the latter, the case being like those relating to patent inventions: but that the answer made to that argument was that literary productions stand upon different and higher ground from that occupied by mechanical inventions; that the intention of the legislature in the enactments relating to copyright was to elevate and protect literary men; that such an intention could only be effectuated by holding that the actual composer of the work was the author and proprietor of the copyright; and that no relation existing between him and an employer who took no intellectual part in the production of the work could, without an assignment in writing, vest the proprietorship of it in the latter. The Chief Justice and the other members of the Court gave effect to that argument; and they held that, though the jury had found that there was an agreement between the plaintiffs and the author by which the piece when composed was to be the property of the plaintiffs, who had agreed to pay for it, that finding was immaterial; because the effect of the Act of Parliament was that, if the composition

(1) 17 C. B. 427.

1888

EATON v. LAKE.

Lord Esher, M.R.

was solely that of the person so employed to produce it, he was the sole proprietor of the copyright and right of representation, and, in the absence of any assignment in writing, those who employed him could not set up any right in respect of such composition. Such was the view taken by the Court of Common Pleas in 1856, and I think it is impossible for us now to depart from it. Applying that decision to this case, here the jury have found that this piece of music was an independent composition by the plaintiff. Thereupon it follows by the Act that the plaintiff is the proprietor of the exclusive copyright and right of representation. The defendant, however, says that the plaintiff agreed to compose the piece for him, or at any rate made a contract that the defendant should be entitled to represent it, and therefore he cannot recover penalties in respect of the representation by the defendant, because the defendant has done nothing in contravention of his right; but the answer is that by the express terms of the Act the defendant cannot set up the agreement, because it is not in writing.

Then it is argued that the plaintiff is estopped. That must mean either that he is estopped from saying that he was the sole composer of the piece of music, or that he is estopped from saying that he had not assigned the right of representation. I can see nothing whatever that could possibly estop him from saying that he was the sole composer, and that the piece was an independent composition; and there was nothing done by the plaintiff which could lead the defendant to suppose that there was an assignment in writing when there was none. For these reasons it appears to me that the appeal should be allowed and judgment entered for the plaintiff.

FRY, L.J. I also think that our judgment should be for the plaintiff. Several points have been raised on behalf of the defendant. It was contended in the first place that the plaintiff was not the author of a musical composition within the meaning of the Act, and that contention was put in two ways: first it was said that he could not be considered to be the author of the piece, having regard to the decision in *Hatton* v. *Kean* (1);

(1) 7 C. B. (N.S.) 268.

secondly, it was said that the piece was not a substantial independent musical composition, because it was so connected with other matters that it could not be said to have an independent existence. It seems to me, however, that the whole of this argument is negatived by the finding of the jury to the effect that this piece of music was a substantial independent musical composition of which the plaintiff was the author. Even if it were open to us to review that finding, there is nothing that leads me to the conclusion that it is wrong. The case of *Hatton* v. *Kean* (1) was pressed upon us, but the finding of the jury seems to render that decision inapplicable, for the sole point relied upon in that case by the counsel for the defendant was that the plaintiff was not an author within the contemplation of the Acts.

Then it was said that the nature of the agreement between the plaintiff and the defendant was such that the defendant was from the very inception of its existence the owner of this composition in law. It is true that in *Shepherd* v. *Conquest* (2) the Court left open the question whether under some circumstances the copyright in a literary work or the right of representation might not ab initio be vested in an employer of the actual composer. It seems to me that in the present case no such point arises, because the jury have found that the plaintiff did not sell his rights in the composition to the defendant. I conceive that that finding was addressed to the very point argued for the defendant, and that the meaning of the finding is that the plaintiff did not agree to give any property in the composition whatever to the defendant. With regard to that finding also, I have heard nothing to lead me to the conclusion that the jury were wrong.

A further argument relied upon was that, the words of the 2nd section of 3 & 4 Wm. 4, c. 15, being "contrary to the right of the author," the performances in respect of which the action is brought were not contrary to the right of the author, because he had given a parol licence or consent to such performances. I think that there is great force in the suggestion that what took place at the interview between the plaintiff and the defendant amounted to a parol licence to perform the piece. The statute

(1) 7 C. B. (N.S.) 268. (2) 17 C. B. 427.

1888

EATON v. LAKE.

Fry, L.J.

however, requires a consent in writing, and, that being so, it is impossible to argue that a parol licence prevents the performance from being against the right of the author. The effect of the legislation is, I think, that the exclusive copyright and right of representation is vested in the author, and that the only persons who can claim under him as licensees are persons to whom he has given his consent in writing. We should, in my opinion, be undoing the beneficial provisions of the Act, if we were to hold that a parol licence was sufficient. That argument, therefore, fails.

I then come to the last argument, viz., that there was an estoppel. It was said that by standing by whilst the defendant incurred expenses in engaging a large body of performers, and providing scenery for the performance of the piece, the plaintiff has induced the defendant to believe something and to act on that belief to his detriment. I cannot see that the plaintiff, by the course of conduct which he pursued, has induced the defendant to believe anything which was not the truth of the matter. Nothing which he has done can have had the effect of inducing the defendant to believe that the piece was not an independent composition of which the plaintiff was sole author, or that the plaintiff had given a written licence for the performance of it; and therefore it follows that the defendant cannot have acted on any belief so induced. It is obvious that the defendant did not act on any such erroneous belief but on the expectation that the harmonious understanding which had existed so many years between himself and the plaintiff would still continue to exist, and that no question would arise between them as to the right to perform the piece. So the argument that there was an estoppel likewise fails. The result is that this appeal must be allowed.

LOPES, L.J. I am of the same opinion. The jury have found that this was a substantial independent composition of which the plaintiff was the author. Having regard to the facts and the evidence I think they were clearly right in so finding. Upon that finding it seems to me clear that the case falls within the authority of *Shepherd* v. *Conquest* (1), and I have nothing to add

(1) 17 C. B. 427.

to what has been already said with regard to the question of law which arose in that case. With regard to the question of estoppel, I do not think that there was a particle of evidence upon which to ground an estoppel. For these reasons I agree that this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *Grayston.*

Solicitor for defendant: *J. E. Lickfold.*

E. L.

[IN THE COURT OF APPEAL.]

1887, *Dec.* 15.

THE HIRE PURCHASE FURNISHING COMPANY, LIMITED *v.* RICHENS AND ANOTHER.

Company—Voluntary Winding-up—Prohibition against carrying on Business—Exception where required for beneficial Winding-up—Onus of Proof—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 131.

By s. 131 of the Companies Act, 1862, a company which is being wound up voluntarily shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof.

The plaintiff company sued the defendants for breach of contract. The contract was of a kind which it was the business of the company to make, but it was entered into after the company had commenced proceedings for a voluntary winding-up. The contract and the breach of it were proved:—

Held, that it lay on the defendants to shew that the contract was not required for the beneficial winding-up of the company, and that in the absence of such evidence the plaintiffs were entitled to succeed.

THE plaintiffs were a company formed to supply furniture on the hire purchase system, by which the hirer agrees to pay a certain rental for the furniture hired, and when the whole amount agreed on is paid the goods become the property of the hirer.

The defendants hired a quantity of furniture on such an agreement, by which they were to pay 5*l.* on the signing of the agreement and 3*l.* 10*s.* every month till the agreed amount was paid. The payments being in arrear the plaintiffs, in November, 1886, brought this action for the amount then due under the agreement. The defence was, that the plaintiffs had entered upon a voluntary liquidation at the time of the agreement, and were therefore incapacitated, under s. 131 of the Companies Act, 1862, from carrying on business.

1887

HIRE PURCHASE FURNISHING COMPANY v. RICHENS.

At the trial before Grantham, J., without a jury, it appeared that in February, 1885, a resolution was arrived at to wind up the plaintiff company, and this was confirmed on the 20th of that month. The agreement sued on was made on March 19 in the same year. The learned judge gave judgment for the plaintiffs.

The defendants appealed.

E. Hume Williams (*B. Francis Williams, Q.C.*, with him), for the defendants. Sect. 131 of the Companies Act, 1862, enacts that "whenever a company is wound up voluntarily, the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof." The whole business of this company was to let furniture on the hire purchase system under similar agreements to that made with the defendants. That the agreement may be valid it must have been made with a view to the beneficial winding-up of the company and not with a view to its continuance: *In re Wreck Recovery and Salvage Co.* (1) This was not the case of a contract pending when the winding-up commenced, as in *British Waggon Co.* v. *Lea* (2), and everything pointed to this contract being a mere carrying on of the business after liquidation, and so void.

[He cited *Ince Hall Rolling Mills Co.* v. *Douglas Forge Co.* (3), *In re London, Bombay, and Mediterranean Bank, Limited, (Drew's Case)* (4), and *Bateman* v. *Ball.* (5)].

R. O. B. Lane, for the plaintiffs. The onus is on the defendants to shew that the contract was null and void as not being for the beneficial winding-up of the company, and as they gave no evidence on this point the contract must be treated as valid.

E. Hume Williams, in reply.

Cur. adv. vult.

1887. Dec. 19. BOWEN, L.J. In this case the plaintiffs after becoming involved in a voluntary winding-up had entered into a contract with the defendants to supply them with goods on the hire purchase system. The defendants kept the furniture for a

(1) 15 Ch. D. 353.
(2) 5 Q. B. D. 149.
(3) 8 Q. B. D. 179.
(4) 36 L. J. (Ch.) 785.
(5) 56 L. J. (Q.B.D.) 291.

considerable period of time, during which both parties were treating the hiring agreement as a valid contract. Later on a considerable sum of money became due under the terms of the agreement, and the plaintiffs failing to obtain payment brought this action for the amount due. In answer to this claim the point is taken that when the contract was made the plaintiff company had ceased to exist for all purposes except the process of winding up, and so could not by reason of s. 131 of the Companies Act, 1862, enter into a binding contract such as they claim to have made. Of the particular circumstances under which this agreement was made we have no evidence. The learned judge who tried the case decided it on the authority of the decision of Pollock, B., in *Bateman* v. *Ball* (1). It was there held that the section did not amount to a prohibition which made a contract of a company illegal as between the company and the person with whom the contract was made. It is not necessary to decide whether the view so taken is in our opinion correct, but we express no dissent from it. Assuming, however, for the moment that the section amounts to such a prohibition, the question remains upon whom the onus of proof lies as to the nature and character of the contract. The counsel for the defendants contended that it was for the plaintiffs in order to succeed to establish the affirmative and to prove that the contract was required for the beneficial winding-up of the company. It appears to me that this is not so, but that the onus of proof is on the defendants, who are endeavouring to shew that the dealing is contrary to the provisions of the section. There is a broad principle that where a defendant is attempting to set aside a transaction for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality. The law presumes against illegality. The principle is, as laid down by Mr. Best, that no person shall in the absence of criminative proof be supposed to have committed any violation of the criminal law, whether malum in se or malum prohibitum, and that this presumption holds in all civil and other proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally,

(1) 56 L. J. (Q.B.D.) 291.

1887

HIRE PURCHASE FURNISHING COMPANY v. RICHENS.

Bowen, L.J.

and as far as I know this principle is always acted on in the courts (1). There is a case much in point, *Rodwell* v. *Redge* (2). There the licence to a theatre was presumed from the fact that the performances had gone on continuously. The note to the case gives a practical illustration of the absurdity of the opposite view. "You might just as well in an action for not accepting goods sold which were foreign produce (such as brandies and the like) call on the plaintiff to prove that the brandies had paid the custom-house duties; for that, if they had not paid the duties, the contract for the sale of them was illegal."

It is not enough to say that the company had no authority to enter into this agreement, the question is whether there is anything which strikes at the root of the contract so as to render it illegal. The defendants have failed to shew this and the appeal must therefore be dismissed.

The Master of the Rolls agrees with the other members of the Court.

FRY, L.J. The only observation I will add is on the case of *Shrewsbury and Birmingham Ry. Co.* v. *North Western Ry. Co.* (3). It was there said by Lord Cranworth: "When the legislature constitutes a corporation it gives to that body primâ facie an absolute right of contracting." In the present case the contract itself was colourless, and does not shew whether it was made for the purposes of the beneficial winding-up of the company or not. It affords no evidence whether it was within or beyond the powers of the company, and the defendants have supplied no evidence to shew that it was beyond those powers. The contract therefore stands and the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Law & Worssam.*

Solicitor for defendants: *H. R. Newson.*

(1) Best on Presumptions, § 53; Best on Evidence, § 346.

(2) 1 Car. & P. 220.

(3) 6 H. L. C. 113.

A. M.

[IN THE COURT OF APPEAL.]

1887
Dec. 6.

LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* ANDREW KNOWLES & SONS, LIMITED, AND OTHERS.

Canal Company—Right to Support—Mines under or near Canal—Compensation for not working Mines—Right of Action for Injury to Canal.

By an Act giving a company power to make a canal it was provided that nothing therein contained should affect the right of the owners of land to the mines and minerals lying within or under the lands to be made use of for the canal, and it should be lawful for such owners to work such mines not thereby injuring, prejudicing or obstructing the canal; and further, that if the owner or worker of any coal or mine should in pursuing such mine work near or under the canal, so as in the opinion of the company to endanger or damage the same, or in the opinion of the owner or worker of the mine to endanger or damage the further working thereof, then it should be lawful for the company to treat and agree with the owner or worker, and in case of disagreement a jury was to be summoned to assess the amount such owner or worker ought to receive on being restrained from working such mine, and on payment of the amount assessed by the jury such owner or worker was to be perpetually restrained from working such mine within the limits for which satisfaction should by the jury be declared to extend. The defendants gave the company notice that they were going to work coal forming the support of the canal, and the company declined to purchase or pay compensation to the defendants for leaving the coal. The defendants thereupon worked the coal and thereby damaged the canal:—

Held (affirming the decision of the Queen's Bench Division), that the coal-owner or worker had a right under the Act to require that compensation should be assessed by a jury, but had no right to work the coal to the injury of the canal, and was liable to the company for the damage so caused.

Dudley Canal Company v. *Grazebrook* (1 B. & Ad. 59) distinguished.

SPECIAL CASE, from which the following facts are taken:—

The plaintiffs were the owners of the Manchester, Bolton, and Bury Canal.

The defendants other than Andrew Knowles & Sons, Limited, prior to December, 1873, worked divers mines and seams of coal lying subjacent and adjacent to lands upon which part of the canal was made and maintained. In December, 1873, those defendants parted with their interests in the mines and seams of coal to the defendants Andrew Knowles & Sons, Limited, who since that date have continued to work the same.

A canal with locks, wharves, dock, quay and other appurte-

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

nances was constructed by persons incorporated by 31 Geo. 3, c. lxviii., by the title of the Company of Proprietors of the Canal Navigation from Manchester to Bolton and to Bury, on land acquired for the purpose under the Act.

Sect. 37 of that Act enacts: "That nothing herein contained shall extend to defeat, prejudice, or affect the right of any lord or lords of any manor or manors, or of any owner or owners of any lands or grounds in, upon, or through which the said intended canal, or any towing-paths, wharfs, quays, &c., shall be made, to the mines and minerals lying and being within and under the lands or grounds to be set out or made use of for such towing-paths, &c., but all such mines and minerals are hereby reserved to such lord or lords of such manor or manors, and to such owner or owners of such lands or grounds respectively, their heirs, executors, administrators, and assigns respectively, and it shall be lawful for the lord or lords of such manor or manors, or such owner or owners of such lands or grounds respectively (subject to the conditions and restrictions herein contained), to work, get, drain, take, and carry away, to his, her, or their own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said intended canal, towing-paths, &c., or any of them, anything herein contained to the contrary notwithstanding."

Sect. 38 enacts: "That if the owner or worker, owners or workers of any coal or other mine or mines shall, in pursuing such mine or mines, work near or under the said intended canal, so as, in the opinion of the said company of proprietors, to endanger or damage the same, or in the opinion of the said owner or worker, owners or workers of the said mine or mines, to endanger or damage the further working thereof, then it shall be lawful for the said company of proprietors to treat and agree with the owner or worker, owners or workers, for all such coals or other minerals as may be near or under the said intended canal, as shall be thought proper to be left for the security or preservation of the said intended canal, or mine or mines as aforesaid, and in case the said company of proprietors and such owner or worker, or owners or workers of such mine or mines, shall disagree in the satisfaction to be made for such coal or other mineral, then it shall be lawful for the said commissioners, at the

request of the said company of proprietors, or of such owner or worker, owners or workers of such mine or mines, to cause a jury to be summoned and impannelled, in the manner hereinbefore directed, who shall, and they are hereby authorized and required, by such ways and means as aforesaid, to assess and determine what satisfaction such owner or worker, owners or workers of such mine or mines, ought to have and receive from the said company of proprietors, on being restrained from working such mine or mines; and upon payment or satisfaction made to such owner or worker, owners or workers of such mine or mines, by the said company of proprietors, according to the verdict or judgment of such jury, such owner or worker, owners or workers, of such mine or mines, shall be and they are hereby perpetually restrained from working such mine or mines, within the limits for which satisfaction shall, by the said jury, be adjudged and declared to extend."

Sect. 39 enacts "For the better discovering persons who shall or may open, dig, sink, or carry on any work for the getting of coal or other minerals, contrary to the directions of this Act, it shall be lawful for the said company of proprietors, by themselves, or their agents or servants, at any time or times in the daytime, to enter upon any lands or grounds, through or near which the said intended canal and works, hereby authorized to be made, shall be or pass, wherein any coal or other mines shall or may be dug or opened, and likewise to enter into such coal or other mines, and there to view, search, deal, latch, measure, and use all other means for discovering the distance of the said intended canal or towing-paths from the working part of such mines respectively; and in case it shall appear that any mine hath been worked or got contrary to the directions of this Act it shall be lawful for the said company of proprietors and for their agents, servants, and workmen, at the expense, costs, and charges of the owners or proprietors of such mines respectively, to enter into and upon all such mines, and from time to time use all necessary and reasonable ways and means for repairing, supporting, sustaining, securing, and making safe the said intended canal, towing-paths, and other works, and such expenses, costs, and charges shall be recovered by the said company of proprietors in such and the same

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

manner as the rates hereby granted are to be recovered, and shall be paid into the hands of the treasurer or receiver for the time being of the said company of proprietors, to be applied for the purposes of this Act."

By 1 & 2 Wm. 4, c. lx., passed in the year 1831, the 31 Geo. 3, c. 68, was repealed subject to a proviso that such repeal should not annul or in anywise prejudice or affect any purchase, sale, conveyance, grant, lease, agreement, security, act, matter, proceeding or other transaction or thing whatsoever already made, done, executed, transacted, commenced or instituted under or by virtue of the previous Acts.

By divers statutes the canal became vested in the plaintiffs, who were under the statutory obligation to keep open and maintain it.

The plaintiffs alleged that the defendants had taken and worked coal adjacent and subjacent to the acquired land, and that in consequence of such taking and working of the coal subsidences had occurred whereby the canal had been injured, prejudiced and obstructed, and for the purposes of the case the defendants admitted that allegation.

For the purposes of the case it was admitted that before the defendants took and worked coal forming the adjacent and subjacent support of the canal of the defendants, as to one part thereof they gave the plaintiffs no notice, but as to other parts that they did give notice that they were going to work the coal, and that in the latter case the plaintiffs declined to purchase or pay compensation to the defendants for leaving the coal forming the adjacent and subjacent support of the canal; and also that the defendants took and worked all the coal alleged to have been taken and worked by them as aforesaid in the usual mode without negligence and without doing unnecessary damage save in taking and working the same without leaving sufficient support for the canal.

The plaintiffs contended that the defendants were liable to the plaintiffs for the damages thereby suffered in every case where the defendants had withdrawn support from the plaintiffs' land, and thereby injured, prejudiced, and obstructed the canal.

The defendants contended that they were not liable to the

plaintiffs, and in the alternative that they were not liable to the plaintiffs wherever they had given the plaintiffs notice of their intention to work coal forming the support of the canal, and the plaintiffs had not purchased or paid compensation for the coal forming the support thereof of the intention to work which notice had been given.

The question for the opinion of the Court was, whether the defendants were liable in damages under any and which of the above-mentioned circumstances.

1887. June 17. *Sir C. Russell, Q.C.*, and *Smyly* (*Gully, Q.C.*, with them), for the plaintiffs. Sect. 37 cannot be read as if all the words after "respectively" had been omitted; but some meaning must be given to the words "not thereby injuring, prejudicing or obstructing the canal." These words are declaratory of the common law as it existed when the statute was passed. The effect of the section is that the canal company gets the surface and also a right of support, though in certain events they may have to pay something for the latter beyond what they paid for the surface; while if the coal-owner cannot get the coal without injuring the canal, there is machinery in the Act for compensating him. The Railways Clauses Act, 1845, has no application to canal companies; ss. 78, 79 of that Act nowhere contains the last words of s. 37 of the plaintiff's Act, imposing a limitation on the coal-owner's right of working the mines. Lord Cranworth in *Great Western Ry. Co.* v. *Bennett* (1) says, "It was obviously the intention of the legislature, in making these provisions, to create a new code as to the relation between mine-owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more;" and this passage is cited with approval by Brett, M.R., in *Pountney* v. *Clayton*. (2) The sections of the plaintiffs' Act are very different from the corresponding ones of

(1) Law Rep. 2 H. L. 27 at p. 40. (2) 11 Q. B. D. 820, at p. 836.

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

the Railways Clauses Act. The plaintiffs' Act gives no power to the canal owners to inspect the mines until they have purchased them. If, however, s. 39 is general, and gives the canal-owner a power of inspection at any time, the necessary inference is that a getting of coal which would let down the canal would be a taking of the coal contrary to the Act. The case of *Cromford Canal Co.* v. *Cutts* (1) is in the plaintiffs' favour; s. 34 of the Act in that case was practically the same section as s. 37 in the plaintiffs' Act. There Lord Cottenham, the then Lord Chancellor, says: "If the coal-owner sustains injury, by getting less coal, or by working in a less beneficial manner, for the sake of not injuring the canal, he will, in the same manner as if he be under notice to leave a third of the coal or a pillar, have a right to compensation." These words sweep away all difficulties in the way of interpreting the present Act. In that case there is no suggestion that the mine-owner was trying to force on an arbitration because of damage to the mine; it was damage to the canal, and the case shews that if the mine-owner anticipated damage to the canal, he was entitled to go to arbitration and be paid for his coal. The real effect of ss. 38 and 39 of the plaintiffs' Act was to provide a code of procedure and a court to determine questions as to compensation; it is doubtful whether these sections have not been repealed by 1 & 2 Wm. 4, c. lx.; if so, the plaintiffs are left to their common law rights, and are entitled to support.

Sir R. Webster, A.G., and *Henn Collins, Q.C.* (*John Dixon*, with them), for the defendants. The effect of the statute is that unless the company have either when they bought the surface or when they found that the canal was likely to be damaged paid compensation for the right to support the mine-owner may work the mine provided he does so in a proper and usual manner. The case is similar to that which arises under the Railways Clauses Consolidation Act, 1845, ss. 77, 78, 79, as to which *Pountney* v. *Clayton* (2) is an authority. The right of the mine-owner to go to arbitration under s. 38 arises only where there is an injury to the mine, as for instance by leakage, and he cannot force the company to go to arbitration on the ground that the proposed works will injure the canal. Sect. 37 therefore must from the necessity of the case,

(1) 5 Railway Cases, 442. (2) 11 Q. B. D. 820.

be read with the qualification which was implied in *Dudley Canal Navigation Co.* v. *Grazebrook* (1), that the party working the mine is to do no unnecessary damage or injury to the navigation, and is not to work it out of the usual and ordinary mode of working. The company have a general power to inspect under s. 39, and can always protect themselves from damage by going to arbitration under s. 38, and the effect of holding the defendants liable would be that the company would get their right to support without going to arbitration, and so without paying for it.

[They cited *Dunn* v. *Birmingham Canal Co.* (2); *Stourbridge Canal Co.* v. *Dudley* (3); *Caledonian Ry. Co.* v. *Sprot* (4); *In re Corporation of Dudley.* (5)]

Smyly, in reply.

Cur. adv. vult.

1887. Aug. 10. The judgment of the Court (Mathew and Cave, JJ.) was delivered by

CAVE, J. In this case the defendants have taken and worked coal adjacent and subjacent to the Manchester, Bolton, and Bury Canal, and in consequence of such taking and working of the coal subsidences have occurred whereby the canal has been "injured, prejudiced and obstructed." The coal has been taken and worked in the usual mode without negligence and without doing unnecessary damage save in taking and working the same without leaving sufficient support for the canal, and the question we have to decide is whether under these circumstances the defendants are liable to the plaintiffs for damage so done to the canal. The plaintiffs, or their predecessors in title, have acquired the site of the canal under the powers conferred by an Act passed in the year 1790. Part of the land so acquired was conveyed to them by agreement dated prior to 1831. Part of the land was acquired prior to 1831, but it was not conveyed until 1840, and the residue of the land was also acquired before 1831, but no conveyances or agreements for the purchase of such land can be found or traced. It will be convenient to consider this last case

(1) 1 B. & Ad. 59.
(2) Law Rep. 7 Q. B. 244.
(3) 30 L. J. (Q.B.) 108.
(4) 2 Macq. 449.
(5) 8 Q. B. D. 86; 51 L. J. (Q.B.) 121.

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

Cave, J.

first, and it is obvious that in the absence of any agreement to the contrary the rights of the parties must be regulated by the Act of 1790 under which the land was acquired. Now we think that if s. 37 of the Act is to be construed literally such working has "injured, prejudiced, or obstructed" the canal. It is argued, however, that these words cannot be taken literally but must be read with some qualification, namely, either that the party working the mines is to do no unnecessary damage or injury to the navigation or no extraordinary damage or injury by working them out of the ordinary and usual mode. The case of *Dudley Canal Navigation Co.* v. *Grazebrook* (1) was cited in support of that contention, and unless that case can be distinguished it is binding upon us.

It is important, therefore, in the first place, to consider the terms of the Act of Parliament which was there under discussion. By the 58th section of that Act (the Dudley Act) it was provided that the owners of mines should not carry on works for getting minerals under the canal except as thereinafter mentioned without the consent of the company. By the 62nd section it was enacted that when the owner of any coal-mine lying under the canal should be desirous of working the same he should give three months' notice to the company, and thereupon the company might inspect the mines to determine what coal might be gotten without prejudice to the canal, and if they failed to inspect within thirty days then it should be lawful for the owner of the mines to work such part as lay under the canal, and if upon inspection the company refused to permit the owners to work such part the company should pay compensation. The 79th section enacted that nothing therein contained should affect the right of any owner to the mines lying under the canal, and that it should be lawful for such owner to work such mines provided that in working them no injury was done to the navigation. The difficulty in that case was that if the proviso was to be construed literally it was inconsistent with the 62nd section, for if the owner in working the mines was to be responsible at all events for any injury or damage done to the canal, the company would never purchase the minerals, and the provision as to purchase would be nugatory.

(1) 1 B. & Ad. 59.

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

CAVE, J.

It was held, therefore, that the only reasonable mode of reconciling those sections was to say that the proviso in the 79th section was to be construed with some qualification, namely, that the party working the mines was to do either no unnecessary injury or damage to the navigation, or no extraordinary damage or injury by working them out of the ordinary and usual mode, and by introducing that limitation all the parts of the Act were made consistent with each other.

The Canal Act which we have now to consider differs in many respects from the Dudley Canal Act. By the 37th section it is enacted that nothing therein contained should defeat, prejudice or affect the right of any owner to the mines and minerals lying under the canal, but all such mines and minerals were thereby reserved to the owner, and that it should be lawful for the owner (subject to the conditions and restrictions therein contained) to work, get, drain, take and carry away to his, her or their own use such mines and minerals "not thereby injuring, prejudicing or obstructing the canal." The 38th section provided that if the owner of any mines should, in pursuing such mine work near or under the canal so as in the opinion of the company of proprietors to endanger the same, or in the opinion of the owner of the mines to endanger or damage the further working thereof, it should be lawful for the company to treat with the owner for all such minerals as might be near or under the canal as should be thought proper to be left for the security of the canal or mines, and in case the company and owner should disagree in the satisfaction to be made for such minerals, then it should be lawful for the commissioners at the request of the company or of the owners to cause a jury to be summoned to assess and determine what satisfaction such owner ought to have or receive from the company on being restrained from working such mines, and upon payment or satisfaction made to such owner by the company according to the verdict or judgment of the jury, the owner should be and he was thereby perpetually restrained from working such mines within the limits for which satisfaction should by the jury be adjudged and declared to extend.

Turning now to the distinction between the two Acts, we find that the Dudley Canal Act requires the owner to give three

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

Cave, J.

months' notice of his intention to work the mines while the Manchester Canal Act does not require the owner to give any such notice. Then, by the Dudley Canal Act, the company have power to inspect, and if they fail to do so within thirty days the only remedy the owner has is to work the mine. So, again, if they inspect and do not refuse permission to work, the owner can only work the mine, he cannot compel the company to give him compensation. Under the Manchester Canal Act the company have no power to inspect, and the owner may initiate proceedings for compensation if in his opinion the further working of the mine will be endangered or damaged. It is true that s. 38 says that it shall be lawful for the company to treat with the owner, but we apprehend that that form of expression is only used because the company as a body owing their existence to the Act require an express power to enable them to treat, which the owner of the minerals, as a natural person, does not require. We are of opinion that the further working of the mine is damaged if by reason of the proximity of the canal the owner cannot work his mine as beneficially as he otherwise would do without danger of letting down the canal.

Now if we are right in holding that either the company or the mine-owner may initiate proceedings for the assessment of compensation, the whole scheme of the two Acts is essentially different, and the literal construction of s. 37 is not inconsistent with s. 38. Moreover the absence of any provision requiring the mine-owner to give the canal company any notice of his intention to work the mines deprives the canal company of the protection which was by their Act thrown round the Dudley Canal Company, and is another reason why we should give its natural interpretation to the language of s. 37.

The legislature in s. 38 regards the canal company and the mine-owner as having opposite interests, and when in the opinion of either his interests are threatened, he can claim to make or receive compensation, and in that case the canal company will pay for so much of the minerals as is necessary for the support and safety of the canal, while the mine-owner will get paid for so much of the minerals as he is prevented from working.

The Attorney-General in fact asks us to put a non-natural

interpretation on s. 37 in order to remedy a difficulty got into by putting a non-natural interpretation on s. 38.

Consider what the result of accepting this view would be. The mine-owner is under no obligation to give notice to the canal company that he is going to work near or under the canal, and if it is his interest to get 100*l.* worth of coal under the canal he may do it if he works in the usual mode without negligence and without doing unnecessary damage, although he is perfectly aware that his doing so will involve damage to the extent of 100,000*l.* to the canal company, and that they have not the slightest idea of their danger. The Dudley Canal Act was passed in the year 1776, while the Act which we are now discussing was passed in the year 1790, and before the case of *Dudley Canal Co.* v. *Grazebrook* (1), which was decided in 1830, and it may well have been that the provisions of the Act of 1790 were altered from those of the Dudley Canal Act in order to avoid raising the difficulties which were settled by that decision. With reference to those parts of the site of the canal which were conveyed to the company under agreements or conveyances it was not suggested upon the argument of the case that those conveyances gave the mine-owner any greater rights than those which were conferred upon him by the Act.

The case raises other questions which, although not argued, require to be disposed of. In some cases the mine-owner gave the canal company notice that they were going to work under and near the canal, and when such notice was given in some cases the plaintiffs declined to purchase or to pay compensation, and in others they did nothing. Now the rights and liabilities of the parties are regulated by the provisions of the statute, which, however, contains no section requiring the mine-owner to give notice to the canal company of his intention to work the mines, or providing for the rights and liabilities of the parties in case any such notice is given. No facts are stated which would justify us in inferring that the plaintiffs consented to or acquiesced in the working of the mines by the defendants, and indeed we understand that that question is reserved for decision hereafter. The Act of 1790 is repealed by the 1st section of the Act of 1831,

(1) 1 B. & Ad. 59.

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

Cave, J.

but that section contains a proviso that the repeal is not to affect any purchase, sale, conveyance, &c. already made. We think that this must be taken to reserve the rights of the company to purchase the minerals and of the mine-owner to receive compensation in the manner provided for by the repealed enactment. If ss. 37, 38, and 39 of the Act of 1790 are not preserved by the proviso to s. 1 of the Act of 1831 it would follow that the company could not after the passing of the Act of 1831 purchase the minerals under the canal, nor could the mine-owner obtain compensation where he was unable to work them, a state of things so injurious to both parties that we cannot imagine it to have been in the contemplation of the legislature. We must answer the question propounded in the case by deciding that, subject to the defences reserved, the defendants are liable in damages under each of the circumstances mentioned in the case.

Judgment for the plaintiffs.

The defendants appealed.

1887. Dec. 6. The same counsel represented the parties.

LORD ESHER, M.R. The question put to us is whether, if it can be proved that the defendants have worked their mines so as to injure the canal, there is a cause of action against them by the canal owners. That depends on the construction of the Act 31 Geo. 3, c. 68, and not on any common law right or on the conveyances. The case turns on s. 37 alone of the Act, but in order to construe that section we must look to the Act to see whether we can from the other parts of it get anything which will enable us to construe s. 37. If that section is taken alone, no one has suggested that it is not clear. If read alone it is a limitation, first, on the rights of the canal company, and, secondly, of the owners of mines under and adjacent to the canal who had, under the authority and according to the stipulations of the Act sold their land for the purposes of the canal, reserving the mines and minerals. They sold the surface and every part of the land except the minerals. I do not agree that the canal company bought any portion of the coal, which remained the property of the persons who sold the rest of the land to the canal company. But then, having sold not merely the surface but the rest of the

land, except the minerals, they would require means of access for the purpose of getting the coal, because they would not be entitled to come on the land, and if they could not get at the minerals from their own land they would not be able to get at them at all. There is accordingly a power given to them to work the mines subject to the restriction that they must not thereby injure, prejudice, or obstruct the canal. Reading the words in their ordinary sense it is clear that however carefully they may have worked the mine, if it is shewn that the working has injured the canal, they have broken through the restriction and rendered themselves liable to an action for damages. Now it is said we must not so read this section, because to do so would make it inconsistent with other parts of the Act. If there is an inconsistency it is to be found in s. 38, and is the supposed injustice that under certain circumstances the mine-owner will have been paid twice for the same thing, or else will have had a right taken away from him for which he has not received any compensation. I accept the argument that on the construction of the former section as to what is to be paid on taking the land not only the price of the land but something more may be included. If it is shewn that from the restriction on working the mines loss would certainly or probably arise to the mine-owner, then the jury would have to estimate this. But that cannot apply to things that could not be known at that time, and therefore could not be estimated. But if we construe s. 38 as applicable to an injury due to the restriction, but found out afterwards, then, when it is found out, the mine-owner would get compensation for the injury done to him by preventing him working so favourably as he otherwise would. This is, perhaps, to give the words a meaning which at first sight is not applicable to them, but which must be given unless the words of s. 37 are to be limited. I think the words of s. 38 should be read in a large sense rather than those of s. 37 in a limited sense.

It is said, however, that the case of *Dudley Canal Co.* v. *Grazebrook* (1) is an authority which binds us to put a limited construction on s. 37. I do not know that I should have decided that case in the same way, but however that may be, it is binding

(1) 1 B. & Ad. 59.

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

Lord Esher, M.R.

on us, both from its old standing and because it was adopted by the Court of Appeal in *Stourbridge Canal Co.* v. *Dudley* (1). If the Acts were substantially the same we should be bound to follow that decision, but even without authority I think that is not so, and we have the great authority of Lord Cottenham in the case of *Cromford Canal Co.* v. *Cutts* (2) on the construction of an Act in the terms of the one we have before us. He distinguished the case from the *Dudley Case*, which it had been argued was exactly similar, and then said, "Now that clause read by itself is free from any ambiguity or doubt. The owner of land may work and carry away the coal provided he does no harm to the canal in getting it. That is a restriction on his right, whether the company purchase the coal or not, he is restricted from getting it if he thereby injure the canal." It seems to me to be very plain that the owner of the mine, whether he has taken the steps entitling him to payment or not, or whether he has been paid or not, if he works his mine must do so without injuring the canal, and that if he does injure it he will be liable to pay compensation for the injury.

I think, therefore, that the acts alleged would create a cause of action against the mine-owners, and I answer the question put to us as it was answered by the judgment of the Court below.

FRY, L.J. The plaintiffs sue the defendants, owners of seams of coal which were reserved to them on the sale of the land for the purposes of the canal on the ground that the defendants have so worked the coal as to injure the canal. The plaintiffs say that this is actionable, which the defendants deny. At the first blush the case for the plaintiffs on s. 37 of the Act seems very clear, but it is necessary to see what is contained in the other parts of the statute. The statute has given power to take the land, and it has equally, of course, provided that compensation shall be paid for the lands taken. The 33rd section vests the entire interest, on payment of compensation, in the person who pays it, subject, however, to the reservation of the mines and minerals contained in s. 37, which, however, is subject to the restriction that the working shall not injure, prejudice, or obstruct the canal.

(1) 30 L. J. (Q.B.) 108. (2) 5 Railway Cases, 442.

The statute has thus given a power to the mine-owner to work under or adjacent to the canal, but has put a fetter on that power by making him liable if he causes by his working an injury to the canal. It is said, however, that the next section raises a difficulty, and makes it necessary to read the words of s. 37 in a restricted sense. The 38th section is also by way of proviso, and it provides for the contingency of the owner or worker of any coal or other mines who shall work near or under the canal, and it provides for the double alternative of the opinion of the company that such working would endanger or damage the canal, and the opinion of the owner that such proximity would endanger or damage the further working of the mine. I pause to observe that, in my judgment, s. 38 gives rights and remedies to a larger class of persons than the mine-owners who are mentioned in s. 37. Thus it may refer to owners of a mine under the canal which, having been severed from the other land before the construction of the canal, could not have been reserved to the owners of the surface land. Further, it applies to owners of mines who are working near the canal. These owners of mines might be persons from whom a portion of the land had been purchased, or they might be owners from whom no land had been purchased. They might, therefore, be owners of land not affected by the reservation in s. 37, and yet within the scope of s. 38. Then the section goes on to provide the machinery for determining the compensation, that is, either by direct treaty between the parties or by reference to a jury. This may be initiated by either, but I neglect the case where the canal company are apprehensive of danger arising, and confine my attention to the case of a mine-owner who is so, and I ask myself what does that expectation of damage include. It appears to me to include the expectation of being prevented from working the mine near or under the canal in the most beneficial manner by reason of two things—the presence of the canal and the fetter put upon the working of the mine by s. 37. In that state of things he appears to me to be a person who is suffering damage, not to his interest in the mine as it stands, but to the further working of the mine, which will be less beneficial than it would otherwise have been. There is, therefore, power to recover compensation under s. 38. I find, then, nothing in the

1887

LANCASHIRE AND YORKSHIRE RAILWAY CO. v. KNOWLES.

FRY, L.J.

statute which shews that it is necessary to cut down the natural meaning of the words of restriction in s. 37.

It is said, however, that this is one of a class of statutes upon which decisions have been arrived at which are binding on the Court, and we are pressed with the case of *Dudley Canal Co.* v. *Grazebrook.* (1) In my opinion the two statutes are essentially different. In the *Dudley Case* the statute gave no power to the mine-owner to compel payment of compensation, but only a power to go on with his mining operations unless he was compensated. The decision on that statute does not touch the present case, and this view is fully borne out by the judgment of Lord Cottenham, who had to determine the very point which has been the main contention of the appellants in the present case, namely, that the coal had been already paid for. I understand Lord Cottenham to have determined that the coal-owner was entitled to compensation under a section similar to s. 38 of this statute for every limitation of his power of working his mine placed on him by a section similar to s. 37.

For these reasons the natural construction of s. 37 is that which I think we should adopt, and that is against the appellants.

I am authorized by Bowen, L.J., to express his concurrence in the views we have expressed.

LORD ESHER, M.R. I should wish to add that our decision does not relate in any way to cases under the Railways Clauses Act, 1845.

Appeal dismissed.

Solicitors for plaintiffs: *Clarke, Woodcock, & Ryland, for C. Moorhouse, Manchester.*

Solicitors for defendants: *Gregory, Rowcliffes, & Co., for Fullagar & Hulton, Bolton.*

(1) 1 B. & Ad. 59.

A M.

GUARDIANS OF IPSWICH UNION, Appellants; GUARDIANS OF WEST HAM UNION, Respondents. 1887 *Dec.* 17, 20.

Poor-law—Removal of Pauper—Status of Irremoveability—Lunatic—Break of Residence—9 & 10 Vict. c. 66, s. 1.

The husband of the pauper had resided in the respondent union continuously for upwards of three years. During part of this time the pauper was in lunatic asylums, where she was maintained as a pauper lunatic, but in lucid intervals, the aggregate of which amounted to more than a year, she lived with her husband in the respondent union. The husband did not during his residence receive parish relief otherwise than in respect of the maintenance of his wife as a pauper lunatic:—

Held, that the husband was irremoveable, for the periods during which he did not receive parish relief could be put together in order to constitute a year's residence by him under 9 & 10 Vict. c. 66, s. 1, and 28 & 29 Vict. c. 79, s. 8, and that the pauper took her husband's status of irremoveability.

Case stated on appeal from an order of the Essex Quarter Sessions confirming an order for the payment by the appellant to the respondent union of a sum representing the cost of the maintenance of a pauper lunatic, an inmate of an asylum within the respondent union.

The pauper Sarah Anne Warne was the wife of Thomas Warne.

The pauper resided with her husband in the parish of St. Clement, Ipswich, in the appellant union, where he was legally settled, till September 23, 1883, when they went to reside at Leyton, in Essex, in the respondent union.

The pauper's husband resided at Leyton continuously from September 23, 1883, to March 1, 1886, when application was made for her removal to the Essex County Lunatic Asylum.

Between these dates the pauper was confined three times in the Essex County Lunatic Asylum, where she was at the date of the order, and once in the Ipswich Lunatic Asylum, as a pauper lunatic. She resided with her husband at Leyton in the respondent union during her lucid intervals. In the whole period from September 23, 1883, to March 1, 1886, these amounted to 390 days. Between March 1, 1885, and March 1, 1886, she had a lucid interval of 276 days. Except as regards his wife's maintenance as a pauper lunatic the husband of the pauper never

1887

GUARDIANS OF IPSWICH UNION v. GUARDIANS OF WEST HAM UNION.

between September 23, 1883, and March 1, 1886, received parochial relief.

By 16 & 17 Vict. c. 97, s. 102, the costs of the maintenance of pauper lunatics who are irremovable are to be borne by the places in which they are exempt from removal.

J. C. Earle, (*Poland*, with him), for the appellants. At the date of the application the pauper's husband had acquired a status of irremoveability in the respondent union. The case finds that at this date he had, within the meaning of 9 & 10 Vict. c. 66, s. 1, 11 & 12 Vict. c. 111, and the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 8 (1), resided in the respondent union for 390 days, or more than the qualifying year. The computation omits as breaks of residence all times during which the husband of the pauper received parochial relief owing to his wife being maintained as a pauper lunatic. By the express words of 11 & 12 Vict. c. 111, if the husband is irremoveable the wife is irremoveable. [He cited *Reg.* v. *Christchurch.* (2)]

Philbrick, Q.C. (*Woollett* with him), for the respondents. The pauper is removeable. The year intended by the Act is the year before the application, in this case from March 1, 1885, to March 1, 1886. During this year there was a break in the residence of the pauper's husband owing to the pauper becoming chargeable to the parish. The Acts cannot intend that a qualifying year shall be made up by adding together parts of four years.

(1) By 9 & 10 Vict. c. 66, s. 1: "No person shall be removed from any parish in which such person shall have resided for five years" (now by Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 8, "one year,") "next before the application for the warrant: Provided always, that the time during which such person shall be confined in a lunatic asylum, . . . or during which any such person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription, raised in a parish in which such person does not reside, not being a bonâ fide charitable gift, shall for all purposes be excluded in the computation of time hereinbefore mentioned."

11 & 12 Vict. c. 111: "Provided always, that wherever any person shall have a wife and children having no other settlement than his or her own, such wife and children shall be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the said recited Act" (viz. 9 & 10 Vict. c. 66), and shall not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

(2) 18 L. J. (M. C.) 28.

1887

GUARDIANS OF IPSWICH UNION v. GUARDIANS OF WEST HAM UNION.

POLLOCK, B. I am of opinion that this appeal should be allowed. The pauper is by statute irremoveable in the respondent union if her husband has acquired a status of irremoveability. This depends upon whether his year of residence can be made up out of portions of years during which he has not been, as during other portions of such years he has been, in receipt of parish relief owing to his wife having been maintained as a pauper lunatic. A similar point was raised in *Reg.* v. *Christchurch* (1), when the qualifying period was five years, and the Court held that the proper course was to eliminate any time during which there had been statutory disability, and then to see whether five years of residence remained. In this case the pauper's husband has resided in the respondent union under no statutory disability for more than a year. He is, therefore, in my opinion irremoveable, and, according to the statute, because her husband is irremoveable the pauper herself is also irremoveable. The order will therefore be quashed.

HAWKINS, J., concurred.

Order quashed.

Solicitor for appellants: *Rexworthy, for Vulliamy, Ipswich.*
Solicitors for respondents: *Hilleary & Taylor.*

(1) 18 L. J. (M. C.) 28.

H. D. W.

1888
Feb. 10.

THE QUEEN *v.* THE DIRECTORS OF THE GREAT WESTERN RAILWAY COMPANY.

Coroner—Inquisition—Amendment—Persons charged with Murder or Manslaughter—Insufficient Designation—Jurisdiction of Queen's Bench Division to quash Inquisition—Coroners Act, 1887 (50 & 51 *Vict. c.* 71), *s.* 20.

By s. 20 of the Coroners Act, 1887, if in the opinion of the Court having cognisance of the case an inquisition finds sufficiently the matters required to be found thereby, and where it charges a person with murder or manslaughter sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the Court may order the proper officer of the Court to amend any defect.

On a rule for a certiorari to bring up and quash an inquisition charging that "the directors of the Great Western Railway Company" did feloniously kill and slay G.:—

Held, that the Queen's Bench Division had no power to amend the inquisition by sufficiently designating the directors by name, because the power to amend was limited by s. 20 to the Court before whom the persons charged should be brought for trial; but that the jurisdiction of the Queen's Bench Division to quash the inquisition for the irregularity on the face of it was left untouched by that section.

Rule, obtained on behalf of the directors of the Great Western Railway Company, calling upon G. P. Grenfell, one of the coroners of the county of Cornwall, the Director of Public Prosecutions, and the next of kin of one T. J. George, deceased, to shew cause why a writ of certiorari should not issue to remove into the Queen's Bench Division, for the purpose of quashing, an inquisition taken before the coroner upon an inquest held, on January 30, 1888, upon the body of one T. J. George, deceased.

The finding of the coroner's jury, as stated in the inquisition, was "that the directors of the Great Western Railway Company, on the 28th day of January, in the year aforesaid, did feloniously kill and slay the said Theophilus John George against the peace of our lady the Queen her crown and dignity."

Poland, for the Director of Public Prosecutions, shewed cause. It is conceded that the inquisition is irregular on the face of it, because the persons charged in it were not sufficiently designated by name. The coroner has no power to amend the inquisition, and unless it be amended there is no mode of bringing the

defendants up for trial at assizes. It is desired to take the opinion of this Court whether s. 20 of the Coroners Act, 1887 (1), enables this Court to amend the inquisition by inserting the christian and surnames of the directors, and so enable the coroner to issue his warrant, as he is bound to do, under s. 5 of the Coroners Act, 1887, where the inquisition charges murder or manslaughter. If the Court cannot amend, it is admitted that, unless the Act of 1887 has taken away the jurisdiction of this Court to quash the inquisition for defects appearing on the face of it, the inquisition ought to be quashed.

Asquith, for the next of kin of T. J. George, also shewed cause.

Sir H. James, Q.C., and *R. S. Wright*, for the directors of the Great Western Railway Company, were not heard.

MATHEW, J. I am of opinion that this rule must be made absolute. There can be no doubt that the inquisition is irregular on the face of it. It is suggested that s. 20 of the Coroners Act, 1887, gives a power of amendment, but that section gives no such power to this Court; it contemplates an amendment by the Court before whom the person criminally charged is brought for trial. Then does s. 20 in any way affect the jurisdiction of this Court to quash an inquisition irregular on the face of it? I am clearly of opinion that it does not. I think that we have jurisdiction to quash this inquisition.

(1) 50 & 51 Vict. c. 71, s. 20: "If in the opinion of the Court having cognizance of the case an inquisition finds sufficiently the matters required to be found thereby, and where it charges a person with murder or manslaughter sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the Court may order the proper officer of the court to amend any defect in the inquisition, and any variance occurring between the inquisition and the evidence offered in proof thereof, if the Court are of opinion that such defect or variance is not material to the merits of the case, and that the defendant, or person traversing the inquisition, cannot be prejudiced by the amendment in his defence or traverse on the merits, and the Court may order the amendment on such terms as to postponing the trial to be had before the same or another jury as to the Court may seem reasonable, and after the amendment the trial shall proceed in like manner, and the inquisition, verdict, and judgment, shall be of the same effect, and the record shall be drawn up in the same form, in all respects as if the inquisition had originally been in the form in which it stands when so amended."

1888

THE QUEEN v. DIRECTORS OF GREAT WESTERN RAILWAY COMPANY.

A. L. SMITH, J. I am of the same opinion. I agree that our jurisdiction to quash the inquisition is untouched by s. 20, and that we have not jurisdiction to amend under that section. I wish to add that I am not satisfied that any amendment could be made under that section by any Court, because the power of amendment is only given where the inquisition "sufficiently designates" the person charged with murder or manslaughter. The rule to quash the inquisition must be made absolute.

Rule absolute.

Solicitor for the prosecution: *The Solicitor to the Treasury.*

Solicitors for the next of kin: *Bolton & Co., for W. Dale, Penzance.*

Solicitor for the Directors of the Great Western Railway Company: *Nelson.*

W. A.

Jan. 16.

WINDER, APPELLANT; THE GOVERNORS AND GUARDIANS OF THE KINGSTON-UPON-HULL CORPORATION FOR THE POOR, RESPONDENTS.

Trade Union—Right of Guardians to reimbursement by, as a Benefit Society—Enforcement of Agreement with—Trade Unions Act, 1871 (34 & 35 *Vict.* c. 31), *s.* 4—*Divided Parishes Act*, 1876 (39 & 40 *Vict.* c. 61), *s.* 23.

A trade union is not a "benefit or friendly society" from which guardians of the poor can claim reimbursement under s. 23 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 23, in respect of the maintenance of a pauper.

CASE stated under s. 33 of the Summary Jurisdiction Act, 1879, by the stipendiary magistrate for Hull.

The appellant was secretary to the Hull Number One Branch of the United Society of Boilermakers and Iron Shipbuilders, a body registered as a trade union under the Trade Union Acts, 1871 and 1876.

The respondents, the governor and corporation of the Kingston-upon-Hull Incorporation for the Poor, obtained from the magistrate, under s. 23 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), an order for the payment of 1*l.* 11*s.* 7*d.*, a sum due to them for the maintenance of Thomas Brewer, deceased, a pauper lunatic. At the time of his death the pauper had for

some time been entitled under the rules of the trade union to an allowance of 10*s.* a week.

The appellant contended that the order was invalid, on the grounds that the association was not a "benefit or friendly society" within the meaning of s. 23 of the Divided Parishes Act, 1876, and that s. 4 of the Trade Unions Act, 1871, applied, and the magistrate had not jurisdiction.

R. S. Wright, for the appellant. The order is invalid. The effect of s. 4 of the Trade Unions Act, 1871 (1), is that no contract made by or with a trade union is enforceable at law. The members are protected from criminal proceedings for conspiracy, but neither they nor the union can maintain civil proceedings in respect of the application of the funds of the society. The trade union, therefore, was not legally liable to the pauper or his representatives in respect of the allowance. It is, however, legal liability only which is contemplated by s. 26 of the Divided Parishes Act, 1876. (2) The words "entitled," "bound," "legal discharge," and "exonerated from further liability" shew this to be the true construction.

(1) By the Trade Unions Act, 1871 (34 & 35 Vict. c. 31), s. 4: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely," inter alia, "any agreement for the application of the funds of a trade union to provide benefits for members."

(2) By the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 23: "Where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same to the pauper may, from time to time, pay to the board of guardians of any union or parish out of the instalments which have become due, the cost incurred in the relief of such pauper accrued since the last instalment, and such payment shall be a legal discharge to such trustee or other person for so much money as shall have been so paid.

"Where the guardians incur any expenses in the relief of a pauper lunatic, being a member of a benefit or friendly society, and as such entitled to receive any payment, they may recover from him as a debt, or from his executors, administrators, or assigns, in case of his death, the sum so expended by them as aforesaid, and the managing body of such society, after notice from the clerk to the guardians served previously to the money being paid over, shall be required to pay the same to such guardians, and shall be exonerated on payment thereof from any further liability."

1888

WINDER v. GOVERNORS AND GUARDIANS OF KINGSTON-UPON-HULL CORPORATION FOR THE POOR.

[He cited *Rigby* v. *Connol.* (1)]

Cyril Dodd, for the respondents. The order is valid. The argument for the appellant takes no account of the word "directly" in s. 4 of the Trade Unions Act, 1871. The guardians can apply for an order to the union, though the pauper himself could not have done so. A trade union the members of which receive allowances is a "benefit or friendly society," and the pauper is a "member entitled to receive a payment" within s. 23 of the Divided Parishes Act.

[He cited *Wolfe* v. *Matthews* (2) and *Hornby* v. *Close.* (3)]

MATHEW, J. I am of opinion that this appeal should be allowed. The question turns on the construction of s. 23 of the Divided Parishes Act, 1876. At the time when this Act passed two classes of societies existed: benefit societies, claims against which were, and trade unions, claims against which were not, legally enforceable by members. I think this section refers to benefit societies and not to trade unions. Its language seems to contemplate legal liability. The pauper is to be "entitled." The trustee is to be "bound." Payment by the trustee is to be a "legal discharge." The guardians may "recover" the fund as "a debt," and payment by the managing body is to "exonerate from further liability." This language is inapplicable to funds with the collection and distribution of which Courts of Law are prohibited by statute from interfering.

I also think that this application was an attempt to "directly enforce an agreement" within s. 4 of the Trade Unions Act, 1871. Practically the guardians were suing in the name of the pauper. If this were possible, it would follow that the statute could always be defeated by the assignment of a claim against a trade union.

A. L. SMITH, J. I am of the same opinion. I think the words "entitled to receive" in s. 23 of the Divided Parishes Act, 1876, refer not to voluntary charity but to legal obligation. The guardians are not entitled to a garnishee order unless the pauper is legally entitled to recover from the garnishee. I also agree

(1) 14 Ch. D. 482. (2) 21 Ch. D. 194.
(3) Law Rep. 2 Q. B. 153.

with my learned brother as to the construction to be placed upon the word "directly" in s. 4 of the Trade Unions Act, 1871.

1888

WINDER v. GOVERNORS AND GUARDIANS OF KINGSTON-UPON-HULL CORPORATION FOR THE POOR.

Order quashed.

Solicitors for appellant: *Collyer-Bristow, Withers, Russell, & Hill, for Laverack, Hull.*

Solicitors for respondents: *Bell, Brodrick, & Gray, for Reed, Winter, & Henson, Hull.*

H. D. W.

THE QUEEN *v.* THE VESTRY OF ST. MARYLEBONE.

1887

Dec. 9, 13.

Artizans' and Labourers' Dwellings Act, 1868 (31 & 32 *Vict. c.* 130), *s.* 3—"*Owner*," *Definition of—Time when Ownership to be ascertained.*

By various sections of the Artizans' and Labourers' Dwellings Act, 1868, notices of all proceedings, &c., under the Act are directed to be served upon the "owner" of the premises which are being dealt with by the local authority; by s. 3 "owner" is to include "all lessees or mortgagees of any premises required to be dealt with under this Act, except persons holding or entitled to the rents and profits of such premises for a term of years, of which twenty-one years do not remain unexpired."

In July, 1886, the tenant of premises was possessed of them as assignee of a lease expiring at Michaelmas, 1886, and was also the assignee of another lease of the same premises for twenty-one years, commencing on the expiration of the first lease. In the same month the vestry, in the exercise of their powers under the Act, caused copies of the reports of their officer of health and their surveyor, with a notice of the time and place appointed for their consideration, to be served upon the tenant, as being the "owner," under s. 7 of the Act. In the following October an order was made by the vestry for the demolition of the premises. The work required was done by the tenant, who upon its completion applied to and obtained from the vestry a charging order upon the premises:—

Held, that although the interest of the tenant in the new lease was in law only an interesse termini, he had such an interest in the premises at the time when the proceedings were initiated by service of the notices upon him as to make him the "owner" within the meaning of the section:

Held, also, that the point of time to be looked at in order to determine the ownership for the purposes of the Act was the date of the service of the notices and not of the making of the order for demolition.

SUMMONS for a certiorari to bring up and quash a charging order made by the vestry of St. Marylebone, referred by Pollock, B., to the Court. The facts which gave rise to the application were shortly as follows:—

In the month of July, 1886, one Hyde was entitled as assignee to the residue of a long lease expiring at Michaelmas, 1886, of

1887

THE QUEEN v. VESTRY OF ST. MARYLEBONE.

certain houses of which Captain Berners was the freeholder, and he was also the assignee of a new lease of the same property which had been granted for twenty-one years commencing on the expiry of the old lease at Michaelmas, 1886, the leases containing the ordinary covenants to repair. At that time the houses were in a very unsatisfactory condition, and the vestry proceeded to put in force the powers conferred upon them as the local authority by the Artizans' and Labourers' Dwellings Act, 1868. A report having been made by the officer of health that the premises were in a condition dangerous to health so as to be unfit for human habitation, and the surveyor having reported as to the cause of, and remedy for, the evil, the vestry under the provisions of s. 7 caused copies of the reports and a notice of the time and place appointed for their consideration to be sent to Hyde as the "owner" (1) of the premises; these were served upon him on July 8. On September 23 Hyde attended before the vestry, but upon an application by the representative of Captain Berners the matter was adjourned to September 30. On that day the matter was gone into, Hyde contending that structural alterations were sufficient, while Captain Berners, the freeholder, submitted to any order that the vestry might make; and on October 14 the vestry made an order for the demolition of the premises, which was served upon Hyde as the owner.

Against this order Hyde appealed to quarter sessions under s. 9 of the Act. Before the appeal came on for hearing, Hyde effected certain structural alterations in one of the houses which satisfied the vestry, and on January 22, 1887, an order was made by the sessions by consent that structural alterations should be made in the houses in lieu of the demolition originally ordered. The work was done by Hyde, no objection being made during its progress by Captain Berners, the freeholder, whose solicitor wrote to the solicitor for Hyde urging him to get the "owners" to complete the work. When the work was finished Hyde applied

(1) By s. 3 of the Artizans' and Labourers' Dwellings Act, 1868 (31 & 32 Vict. c. 130), "the expression 'owner,' in addition to the definition given by the Lands Clauses Act, shall include all lessees or mortgagees of any premises required to be dealt with under this Act, except persons holding or entitled to the rents and profits of such premises for a term of years, of which twenty-one years do not remain unexpired."

1887

THE QUEEN v. VESTRY OF ST. MARYLEBONE.

to, and obtained from, the vestry under s. 25 of the Artizans' and Labourers' Dwellings Act, 1868, a charging order upon the premises for the expenditure incurred. A summons was thereupon taken out at chambers on the part of Captain Berners for a prohibition to restrain the vestry from proceeding upon the charging order, which was subsequently amended by adding an application for a certiorari to bring up and quash the order of the vestry, it being contended that Hyde was not the "owner" of the premises either at the date of the commencement of the proceedings or of the order for demolition. The summons was referred by Pollock, B. to the Court.

Clarence Peile, for the freeholder, in support of the summons. Hyde was not an "owner" of the premises within the meaning of s. 3 of the Artizans' and Labourers' Dwellings Act, 1868. In July, 1886, he had vested in him as assignee three months of the original lease, and he was also assignee of the new lease for twenty-one years; he had in law only a lease for the three months, and an interesse termini for the twenty-one years. The circumstance of the second lease being vested in the same person as the first lease, and commencing immediately upon the expiration of the first, cannot operate to make the second lease a continuance of the first, and so to make Hyde the owner of a term of which more than twenty-one years were unexpired: *Doe* d. *Pulteney* v. *Lady Cavan*. (1)

[POLLOCK, B. He was "entitled to the rents and profits" for more than twenty-one years.]

Those words were inserted in the definition of "owner" in order to cover the case of mortgagees. Secondly, even assuming that Hyde was the owner at the date when the notice was given by the local authority, he was no longer the owner within the meaning of the section when the order for demolition was made in October, which is the earliest date that can be looked at. He was then the holder of a lease of which less than twenty-one years remained unexpired, and the freeholder was the owner under the Act. The notices are only preliminary, and no liability is ascertained until the order of the local authority is made. By s. 9 of

(1) 5 T. R. 567.

1887

THE QUEEN v. VESTRY OF ST. MARYLEBONE.

the Artizans' and Labourers' Dwellings Act Amendment Act, 1879 (42 & 43 Vict. c. 64), where the local authority themselves execute the required works on default of the owner of the premises they may recover expenses from such owner; and a similar power of recovering expenses from defaulting owners is given by s. 150 of the Public Health Act, 1875, under which latter Act it has been held that this liability is imposed on the person who is owner at the time of the completion of the work, and not on one who was owner at the time the notices to do the work were given, but had ceased to be owner before it was done: *Reg.* v. *Swindon Local Board.* (1) That is a very similar case to the present, and the freeholder, and not Hyde, was the owner within the meaning of the Act.

Channell, Q.C. (*Fraser McLeod*, with him), for Hyde, shewed cause. Hyde was the owner within the meaning of s. 3 of the Act. The draughtsman seems to have contemplated the very case of an interesse termini, which is amply covered by the words "entitled to the rents and profits." Hyde is therefore not within the exception, and is a lessee having more than twenty-one years unexpired.

As to the date which is to be looked to, the Act cannot mean that two persons by fighting through the proceedings and causing delay should shift the burden from one to the other. *Reg.* v. *Swindon Local Board* (1) only decides by whom the ultimate expense is to be borne, not who is liable to do the works.

In any event the freeholder is estopped by his own conduct from contending that Hyde was not the owner.

Poland (*English Harrison*, with him), for the vestry.

Peile, in reply.

POLLOCK, B. I am of opinion that this application ought to be dismissed. It appears that in July, 1886, when a notice was served by the vestry that the premises in question were in bad order, Hyde was possessed of an unexpired lease for a long term, which expired at Michaelmas, 1886, so that in respect of that lease alone, he had not a sufficient term to authorize the making of an order against him as an owner under the Act. But

(1) 4 Q. B. D. 305.

he was also the assignee of a reversionary lease for twenty-one years from Michaelmas, 1886, and the first question for our determination is whether under those circumstances he was the owner of the premises within the meaning of the statute. Now s. 3 excepts from the definition of owner persons holding or entitled to the rents and profits of premises for a term of years of which twenty-one years do not remain unexpired. In the present case the unexpired period of the old lease added to the lease commencing at Michaelmas, 1886, together amount to more than twenty-one years, but it is argued on behalf of the freeholder that although Hyde was a lessee under the original lease, he had nothing more than an interesse termini under the second. The question seems to be whether, looking at the words of the section, Hyde had a sufficient interest in the premises in July, 1886, to make them his own for a term of which twenty-one years was unexpired. I think that he had, and as regards this legal objection I think that the order complained of was right.

A second point now arises which is one of general application. It is said that, even if Hyde was the owner within the meaning of the section at the time that the notice was served upon him, he had ceased to be so at the time when the order for demolition was made. What are the facts as to this? In July, 1886, the notice was given as required by the statute, and on the 23rd of September Hyde attended before the vestry, but an adjournment was asked for on behalf of Berners and granted; on October 14 the order was made for the demolition of the premises as being unfit for human habitation. This was subsequently varied by the sessions to an order for certain structural alterations to be made, it having been shewn by Hyde that the necessary improvements could be made without recourse to actual demolition. The matter therefore stands thus; in July, 1886, Hyde was undoubtedly the owner of these premises upon our construction of the statute; at Michaelmas the lease ran out, and in October he had ceased to be the owner within the meaning of the section; the question therefore is whether we are to consider the ownership at the date of the notice that the premises are out of repair or at the date of the order of demolition. I think the Act of Parliament itself answers the question. It contemplates the person who is the

1887

THE QUEEN v. VESTRY OF ST. MARYLEBONE.

Pollock, B.

owner for the purposes of the Act, as restricted by the provisions of the interpretion clause. The scheme of the Act appears to be this. By s. 6 the officer of health is to make a written report as to places unfit for human habitation, which report is to be referred to the surveyor, and upon receipt of his report the local authority may investigate the matter and determine what is required; notice of the contemplated proceedings of the local authority is to be given by the clerk to the owner of the premises. By s. 9 the owner, if aggrieved by any order of the local authority, may appeal to quarter sessions. It has been pointed out that it could never have been intended by the legislature that, if the owner assigned his lease or his interest expired before the decision of the local authority was arrived at or an order made by them, the whole proceedings should begin de novo; it would be of the highest inconvenience and contrary to the whole spirit of the Act if the person who allowed the premises to become dilapidated were to be able thus to get rid of his liability. That is not the case here, for we are not dealing with an assignment by the owner but with this expiration of his interest through effluxion of time; but it has been well pointed out to us that the Act is dealing ex concessu with dwindling interests, and it was clearly not to the public interest for the legislature to enable the owner to rid himself of liability by the plea that his interest quâ owner had run out by effluxion of time. Looking at the language of the Act, it is quite clear that a person is to be fixed with ownership for the purposes of the Act at the time when the notice that the premises are unsanitary is served upon him.

Reliance was placed during the argument upon the case of *Reg.* v. *Swindon Local Board* (1), but that does not seem to me to be much in point. It was a case under a similar Act, the Public Health Act, 1875, and the question was not as to who was liable to do the works required to be done by the local authority, whether it was the owner at the time when the notice to do the works was given or the owner at the time when the works were done by the local authority, but the question was from whom the expenses of doing the works were to be recovered by the local authority in cases where notice to do the works had been given

(1) 4 Q. B. D. 305.

1887

THE QUEEN v. VESTRY OF ST. MARYLEBONE.

Pollock, B.

by them and default had been made by the owner. The Court held that it was not the owner at the time of the giving of the notice, but the person who continued to be owner at the time of the completion of the works, who was liable to the local authority for these expenses. Looking at the scheme of the Public Health Act it is clear that the ownership was to be fixed at one certain period, and that payment was to be distributed over many years, and therefore the expenses were payable by the owners from year to year; and it is pointed out by Cockburn, C.J., in his judgment in *Reg.* v. *Swindon Local Board* (1) that the person in possession of the property, and who is deriving the benefit from the work done, is the person who ought to pay for it, and not the man who has ceased to be owner. Therefore, although I entirely agree with that decision, it seems to me that its spirit is entirely in favour of the view which we are now taking, and that it is no authority in favour of the contention of the applicant. In the result I think that this application must be dismissed with costs.

HAWKINS, J. I am of the same opinion. In considering whether a certiorari ought to issue to quash this charging order the first question that has to be answered is whether in July, 1886, Hyde was the owner of the premises within the meaning of the interpretation clause in this statute. It is there provided that the word "owner," in addition to the definition given by the Lands Clauses Act, shall include "all lessees or mortgagees of any premises required to be dealt with under this Act, except persons holding or entitled to the rents and profits of such premises for a term of years of which twenty-one years do not remain unexpired." Then is Hyde, who had an interest in the premises for more than twenty-one years, to be deemed the owner, and was the notice rightly served upon him? I think both questions must be answered in the affirmative. It is objected that he had only an interesse termini as regards the new lease; but I think that that makes no difference at all, and I am satisfied that in using the word "owner" the legislature intended to include (and I think have included) such a possession as that of Hyde, who was entitled to three months of the old lease, and at the end of

(1) 4 Q. B. D. 305.

1887

THE QUEEN v. VESTRY OF ST. MARYLEBONE.

Hawkins, J.

that time to perfect his title to the new one. That objection therefore fails.

Now what followed after the service of the notice on Hyde? On September 30, when the parties appeared before the vestry, he had ceased to be owner, being then entitled to one day less than the necessary term of twenty-one years, and the question is whether Hyde was the proper person against whom the proceedings should have been continued. I think that he was. What was the object of the legislature? To call on the person who was the owner at the time the premises were found to be in defective condition to set them right. There is nothing to indicate that if a new ownership of the property is created new proceedings are to be taken; rather it seems that there is to be a mere continuance of the old proceedings already instituted. On October 14 the vestry made an order for the demolition of the premises; this order was addressed to and served upon Hyde, and he was treated as the owner. Was any objection then made by Captain Berners? None. If he had thought fit to interfere, he might have done so under the provisions of the Act itself, for under s. 14 he had the option of executing the necessary works before anybody else; but he took no steps. Captain Berners was not a party to the order made by quarter sessions on appeal, but he was made acquainted with it within three days; some would have thought that he would have objected then, if at all, but he took no notice. In the month of May most of the work had been done on the houses, and on the 4th of that month the solicitors for Captain Berners wrote to the solicitor for Hyde asking him to get the "owners" to complete the work. Who was the owner but Hyde, who had done the rest of the work? However, although Captain Berners then knew that Hyde was spending money on the property, no objection was taken by or for him, and Hyde was allowed to go on and finish the work; when this was done Hyde applied for and obtained a charging order to recompense himself for the expense to which he had been put. I must confess that it requires courage under the circumstances to come before us and ask us to set that order aside. I am satisfied that Hyde was the owner at the commencement of the proceedings; the adjournment was only to suit the convenience of Captain

Berners, who finally appeared before the vestry and had the opportunity of disputing that Hyde was the owner, but did not do so. As to the case of *Reg.* v. *Swindon Local Board* (1) I entirely agree with the remarks of my brother Pollock.

Solicitors for Berners: *Saxton & Morgan.*
Solicitor for Hyde: *A. C. Cronin.*
Solicitors for vestry: *Clarkson, Greenwell, & Wylie.*

W. J. B.

WILKINSON AND OTHERS *v.* JAGGER AND OTHERS. *Dec.* 7, 8.

County Court—Practice—Appeal—"Application to County Court"—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 22, *sub-s.* (*d*).

By s. 22 of the Friendly Societies Act, 1875, disputes between members of a friendly society and the society or its officers are to be decided in manner directed by the rules of the society, and by sub-s. (*d*) "where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute."

Held, that the application to the county court contemplated by sub-s. (*d*) must be taken to be an application in the form of an action commenced in the county court, and not a reference to the county court judge sitting as an arbitrator, and that there was an appeal from the decision upon such application to the High Court:—

Quære, where a statute had given an appeal by special case to the High Court from an inferior court under special circumstances, whether such right was affected by Order LIX., r. 10?

Reg. v. *Kettle* (17 Q. B. D. 761) discussed.

APPEAL from the county court judge of Huddersfield. The facts, so far as they are material to the point upon which this case is reported, are shortly as follows:—

The plaintiffs were the officers of the Huddersfield branch or district of the National Independent Order of Odd Fellows Society and the defendants were the officers of one of the lodges forming the district, the objects of the society being to provide for sick allowances and funeral expenses of the members. The members paid their individual subscriptions to the officers of their own lodges, the funeral fund being provided for by a quarterly levy made by the district officers upon the lodges at a

(1) 4 Q. B. D. 305.

1887

WILKINSON v. JAGGER.

prescribed rate for each member, and all funeral moneys were paid out of this fund by the officers of the district. The plaintiffs, as officers of the district, made a levy upon the defendants, as officers of the lodge, for 25*l.* 16*s.* 9*d.* for funeral moneys for the quarter ending April, 1887. The defendants declined to pay on the ground that they had previously taken all the steps required by the rules of the district to enable them to secede from the district and become an independent society, but the plaintiffs refused to recognise their secession on the ground that the proceedings taken by the defendants with a view thereto were irregular. The plaintiffs thereupon brought an action in the county court in which they sought to recover the amount of the levy, and asked to have it declared (inter alia) that the lodge of which the defendants were the officers still formed part of the district and of the society. The registration of the defendants' lodge as a branch of the Huddersfield district having been proved, the case was adjourned on the suggestion of the learned judge in order that the defendants might make an application to the registrar of friendly societies to cancel the registration of the defendants' lodge and register it as a separate society. The application was made, but refused by the registrar on the ground that there was a dispute pending between the lodge and the district as to the payment of contributions. On the adjourned hearing before the county court judge the defendants requested him to hear and determine the question of the validity of their secession, but he declined to hear any evidence on the point, and, holding that the certificate of registration was conclusive evidence that the defendants' lodge was a branch of the plaintiffs' district, gave judgment for the plaintiffs for the amount of the levy claimed by them in the action. The defendants appealed.

Waddy, Q.C., and *J. Lawson Walton*, for the respondents. There is a preliminary objection to the hearing of this appeal. The proceedings in the county court were taken under s. 22, subs. (*d*), of the Friendly Societies' Act, 1875 (1), which gives the

(1) By s. 22 of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), "Every dispute between a member or person claiming through a member or under the rules of a registered society, and the society or an officer thereof, shall be decided in manner directed by the rules of the society, and the decision

parties aggrieved power to "apply" to the county court. The application here provided for is not one by way of ordinary plaint or action in the county court, but is an application to the county court judge as an arbitrator. There is therefore no appeal by motion, as he was not sitting in his capacity of judge, but as an arbitrator, and the only course open to the defendants was to ask him to state a case for the opinion of the Court.

Tindal Atkinson, Q.C., and *G. H. Wilkinson*, for the appellants. The application contemplated by s. 22, sub-s. (*d*) is an application to the county court judge in the exercise of his jurisdiction as a judge, and not a reference to him as an arbitrator; the appeal is therefore properly initiated. In the case of *In re Royal Liver Friendly Society* (1), Chitty, J., held that the provisions of s. 22, sub-s. (*d*), were permissive only and not peremptory, and that there was therefore jurisdiction to remove into the High Court by certiorari proceedings taken in the county court under that sub-section. The proceedings under this sub-section must therefore be in the nature of a county court action, as the remedy by certiorari would be inapplicable to a reference. The section gives

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so made shall be binding and conclusive on all parties without appeal . . .

"Provided as follows:—

"(*a.*) The parties to a dispute in a society may, by consent (unless the rules of such society expressly forbid it), refer such dispute to the chief registrar . . . . who shall . . . . either by himself or by any other registrar hear and determine such dispute . . . . and such determination . . . . shall have the same effect and be enforceable in like manner as a decision made in the manner directed by the rules of the society:"

"(*b.*) Provides for procedure on a reference to the chief registrar:

"(*c.*) Where the rules of a society direct that disputes shall be referred to justices, the dispute shall be determined by a court of summary jurisdiction:

"Provided that in every case of dispute cognisable under the rules of a society by a court of summary jurisdiction, it shall be lawful for the parties thereto to enter into a consent referring such dispute to the county court, which may hear and determine the matter in dispute:

"(*d.*) Where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute:"

"(*e.*) Provides that "the court, chief, or other registrar," may state a case on any question of law, and grant discovery and inspection of documents.

(1) 35 Ch. D. 332.

1887

WILKINSON v. JAGGER.

a power to the county court judge to try questions which he could not previously try, and there are no express words taking away the ordinary right of appeal from his decision when sitting as a judge and not as an arbitrator.

[They also cited *Reg.* v. *Catley* (1); *Hanmer* v. *King*. (2)]

WILLS, J. The preliminary point which has been taken in this case is one of some importance, and is not altogether free from difficulty. Our decision on the present point will not affect the rights of the parties; we only decide whether the appeal from the county court judge is to be by way of special case as from an arbitrator, or in the ordinary way of appeal by motion to this Court. I have come to the conclusion that notwithstanding the ambiguity of the language of the section, the proceeding in the county court was really by way of an ordinary plaint; I mean that the application was covered by a plaint, which took the place in the county court of a formal statement of claim. The word "plaint" has a well-known technical meaning; and if the complaint which it formulates might be the subject-matter of an action in the High Court, there can be no reason for not terming the initiatory statement a "plaint." The test then is whether, apart from legislative enactment, the subject-matter of the proceedings in the county court would be the subject-matter of an action in the High Court. At common law the claim in this action would form the subject of an action in the High Court: and unless there is something in the Friendly Societies Acts which makes it not an action, this claim is an action. We have therefore to decide whether s. 22, sub-s. (*d*), of the Act of 1875 interferes with the bringing of an action under circumstances such as the present; if it does not, the action has been properly brought in the county court, and the appeal to us lies.

This section is unquestionably complicated, but on careful consideration it appears to be logical and consistent. Where the rules of a society have provided a mode for the settlement of disputes between the society and its members, that mode is primâ facie to be binding on all the parties. The section then goes on to say that under certain circumstances and within certain limits

(1) 19 Q. B. D. 491. (2) 57 L. T. 367.

this mode of proceeding may be varied, and by sub-s. (*a*) a power is given to the parties to go before the registrar of friendly societies; and there is a further power of varying the tribunal to which the reference is to be made, for sub-s. (*c*) enacts that the parties may by consent go to the county court where the rules themselves prescribe a reference to justices. Then after prescribing the extent of variation by consent from the mode of proceeding prescribed by the rules the section deals with the case where the rules of the society contain no directions as to the method of dealing with disputes. This sub-s. (*d*) which we are considering provides that in cases where there is no provision in the rules for the settlement of disputes (and where, but for this legislation, the parties would have to go to the High Court), they may apply to the county court. The difficulty which has arisen in the construction of this sub-section would have been obviated if, instead of using the words "apply to," it had said "may bring a plaint in" the county court. Does the use of the word "apply" exclude the notion of going to the county court for the ordinary remedy by way of action? I should be sorry to feel myself bound so to hold, for it is obviously beneficial to the parties that proceedings when once brought in the county court should proceed there in the ordinary way. But this question is scarcely open to us, as the decision of Chitty, J., in *In re Royal Liver Friendly Society* (1) could not stand, unless such proceedings as these were in the nature of an action. In that case proceedings had been initiated in the Liverpool County Court by two members of the society to have certain acts declared to be ultra vires; there was a motion to remove the proceedings—not for the purpose of being quashed, but for the purpose of being continued—into the High Court by certiorari, and unless Chitty, J., had come to the conclusion that the proceedings were in fact an action there would have been no power so to remove them. The substance of that decision is that applications under s. 22, sub-s. (*d*), and under s. 30, sub-s. 10, of the Friendly Societies Act do not oust the ordinary jurisdiction of the High Court, and that so far as proceedings under s. 22, sub-s. (*d*), are concerned they are in the nature of an action, and are therefore removable; had he not so

(1) 35 Ch. D. 332.

1887

WILKINSON v. JAGGER.

Wills, J.

held, that learned judge could not have ordered a certiorari to issue. It seems to me therefore that the decision in that case involved the very point now raised before us. I have come to the conclusion therefore, that the method of procedure provided by s. 22, sub-s. (*d*), is an action commenced by a plaint issued out of the county court, and that this is, therefore, a case in which an appeal lies.

The argument has been addressed to us that the provisions in sub-s. (*e*) for the granting of discovery and inspection are wholly unnecessary in a case covered by the ordinary jurisdiction of the county court, as the court would have power in the exercise of its ordinary jurisdiction to make such orders; that sub-s. (*c*) provides for an undoubted case of reference, in respect of which the county court would want these powers; that sub-s. (*e*) therefore being general in its language implies that all the foregoing subsections stand on the same footing, and that therefore sub-s. (*d*) must be construed as providing for a reference as contra-distinguished from an action. The argument is a legitimate one and well worthy of consideration, but it is not to my mind a satisfactory method of interpretation to say that because an enactment engrafted upon another may, if the natural meaning be given to the language of the substantive enactment, contain something not contradictory or inconsistent, but simply redundant or unnecessary, therefore words should be read in a sense which they do not ordinarily bear. The provisions of sub-s. (*e*) are wanted for sub-ss. (*a*), (*b*) and (*c*), and it does not seem to me to matter much that, though unnecessary for sub-s. (*d*), they are not in terms limited to the other sub-sections.

The present rules as to appeals from county courts forbid a resort to the appeal by special case which by 13 & 14 Vict. c. 61, was given in ordinary actions, and this was the effect of the decision of my Brother Grantham and myself in the case of *Reg.* v. *Kettle*. (1) There are, however, many cases in which the right of appeal by special case is given by statute under special circumstances, to which that case has no necessary application, and as to which I give no opinion. When such a case arises, it must be considered and dealt with upon its own merits and with refer-

(1) 17 Q. B. D. 761.

ence to its own circumstances. It is enough, however, to say that in the present case there was an action properly brought in the county court, and that the appeal was properly constituted.

GRANTHAM J. On the question whether an appeal lies by special case, I think that our decision in *Reg.* v. *Kettle* (1) came to this; that in ordinary cases where an appeal is given to the High Court, that appeal must under the rules made under the Judicature Acts be by notice of motion; but I should be sorry to say that those rules destroy the right of appeal by special case where it is given by statute under special circumstances.

As to the question whether the application under s. 22, sub-s. (*d*), amounts to an alternative appeal by the parties to the county court, or whether it is simply the same power that is conferred upon them by sub-s. (*c*), I think that we ought to follow the decision of Chitty, J., in *In re Royal Liver Friendly Society* (2); although I doubt whether s. 22 of the Friendly Societies Act, 1875, applied to that case. In that case, r. 7 of the society incorporated s. 30 of the Act, and it seems to me to matter not whether another form of settling disputes was given, for this distinct power under s. 30 was there given, and that was sufficient. If the learned judge had decided that case under s. 30 only, no doubt could be entertained as to the correctness of his decision, which might be good under that section, though wrong under s. 22, sub-s. (*d*). In the present case it is desirable that we should base our decision on our view of s. 22, sub-s. (*d*). It is argued that the power there given is not different from that previously given in sub-ss. (*a*), (*b*), and (*c*), but if that is so I can see no necessity for sub-s. (*d*) at all. If the preceding sub-sections give the power to refer disputes to the county court and give the county court an exclusive jurisdiction, what is the good of sub-s. (*d*) if it has only the same effect of giving exclusive jurisdiction to the county court? I admit the difficulty which arises from the fact of that sub-section being immediately followed by sub-s. (*e*), which gives a specific power over interlocutory proceedings to the court or chief registrar;

(1) 17 Q. B. D. 761. (2) 35 Ch. D. 332.

1887

WILKINSON v. JAGGER.

but it does not govern sub-s. (*d*), which gives the power of applying to the county court in the ordinary way.

Judgment for the appellants.

The case was then heard on the merits, and in the result was sent back to the county court judge to decide whether all the conditions as to secession imposed by the district rules had been complied with.

Solicitors for appellants: *Godfrey, Rhodes, & Co., for Piercy, Huddersfield.*

Solicitors for respondents: *Learoyd & James, for Learoyd & Simpson, Huddersfield.*

W. J. B.

1888

Jan. 13.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF RICHARD MORLEY *v.* KING AND OTHERS, LICENSING JUSTICES FOR MANCHESTER.

Inn—Licensing Acts—Wine and Beerhouse Act, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19—*Certificate of Justices for Excise Licence for Sale of Beer, Cider, or Wine—Application by Holder of License in force on May* 1, 1869—*Jurisdiction of Justices—Mandamus—Return of Obedience—Pleading.*

By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19—where on May 1, 1869, a licence is in force with respect to a house for the sale therein of beer, cider, or wine to be consumed on the premises, the justices are not to be entitled to refuse an application for a certificate for the sale of beer, cider or wine to be consumed on the premises in respect of such house except upon one or more of four grounds specified.

Upon an application to licensing justices under the above section for a certificate for a licence to sell wine to be consumed on the premises, it appeared that on May 1, 1869, a licence was in force with respect to the house for the sale of beer to be consumed on the premises:—

Held, reversing the decision of Charles, J., that, upon the true construction of s. 19, the discretion of the justices in refusing the application was unlimited, for the existence of a licence with regard to the sale of beer did not confer any privilege upon an application for a certificate in respect of the sale of either wine or cider.

Upon a mandamus to justices to hear and determine an application for a certificate to sell wine to be consumed on the premises, they made a return of unconditional compliance with the writ. Plea, that the justices were only entitled to refuse the application upon one or more of the four grounds specified in s. 8

of the Wine and Beerhouse Act, 1869, but that they refused the application on other grounds contrary to the statute:—

Held, that the plea was good, as it must be taken to mean that in refusing the application the justices had assumed to exercise a jurisdiction which they did not possess, and that they had therefore not substantially heard and determined the matter submitted to them.

MANDAMUS to the defendants to hold a further adjournment of their general annual licensing meeting, and at such adjournment to hear and determine an application by the prosecutor for a certificate to hold an excise licence to sell by retail wine to be consumed on or off his said premises.

Return. That the defendants, the justices, did hold within a reasonable time after the service of the writ an adjournment of the general annual licensing meeting, and at such adjourned meeting heard and determined the application of the prosecutor for a certificate, as by the writ they were commanded.

Plea: (1.) That the defendants had not heard and determined the matter of the application pursuant to the statutes in such case made and provided. (2.) "A licence for the sale of beer by retail to be consumed on the premises under the Acts recited in the Wine and Beerhouse Act, 1869, was in force on May 1, 1869, and has been ever since renewed with respect to the house in the said writ of mandamus mentioned, which the prosecutor occupied at and before the said general annual licensing meeting, &c., and he thereby became, by virtue of the statute 32 & 33 Vict. c. 27, s. 19, and other statutes relative thereto, entitled to make application to the defendants at such meeting for a certificate for the sale of wine to be consumed on such premises, and he duly made such application accordingly, and it thereby became unlawful for the defendants to refuse such application for a certificate except upon one or more of the four grounds set forth in 32 & 33 Vict. c. 27, s. 8, but the defendants, well knowing the premises, and that none of the said four grounds entitled them to refuse such certificate to the prosecutor, nevertheless wholly refused to hear and determine his said application on such four grounds or either of them, and refused such application on some other ground contrary to the statute."

Reply. That the plea was bad, "on the ground that the matters

1888

THE QUEEN v. KING.

therein alleged did not entitle the prosecutor to the said certificate, or disentitle the defendants from refusing such certificate, except upon one or more of the said four grounds therein mentioned, and on the ground that the matters stated in the said reply shew that the defendants have complied with the said writ, and that their return thereto is true."

Joinder of issue.

At the trial before Charles, J., without a jury, it appeared that an excise licence to sell by retail beer to be consumed on or off the premises in question was on May 1, 1869, held by the then occupier. It was afterwards annually renewed, and was ultimately, in November, 1879, transferred to the prosecutor, and was annually renewed by him. In August, 1887, he applied to the licensing justices for a certificate for a retail wine licence, in pursuance of the Act 23 Vict. c. 27, ss. 7 and 8, and Acts amending the same.

The justices refused the application, and it was not suggested that the ground of their decision was any one of the four grounds mentioned in 32 & 33 Vict. c. 27, s. 8.

The learned judge gave judgment for the prosecutor, holding that, upon the proper construction of 32 & 33 Vict. c. 27, s. 19, the defendants in the exercise of their discretion in refusing the application were limited to the four grounds specified in 32 & 33 Vict. c. 27, s. 8.

The defendants appealed.

Henn Collins, Q.C., and *R. S. Wright*, for the defendants. Before the Act of 1869 there were two classes of licences, (1) licences granted by justices to keepers of public-houses, as to the granting of which the justices had a discretion; and (2) excise licences for the sale of beer, or cider, or wine to which any applicant was entitled, provided that he fulfilled certain statutory conditions. The wine licences were granted under the provisions of the Act 23 & 24 Vict. c. 27, to keepers of refreshment houses. It was thought at first that a person who was licensed to retail beer was not entitled to take out a wine licence under the Act of 1860, but that doubt was removed by s. 10 of the Act 24 & 25 Vict. c. 91.

The Act of 1869 (32 & 33 Vict. c. 27) was passed for the purpose of putting the granting of both classes of licences on the same

footing, and for that purpose it provides by s. 4 that excise licences shall be in future granted only under the authority of a certificate of justices. Then s. 19 (1) saved what may be called vested rights, providing that, as respects a house for which an excise licence was in force on May 1, 1869, the justices shall not refuse a certificate, except on one or more of the grounds specified in s. 8 of the Act.

The question is whether sect. 19 is to be construed distributively, reddendo singula singulis, so that (provided none of the four grounds specified in s. 8 apply) the existence of a beer licence on the given date gives a right to a certificate for a beer licence: the existence of a cider licence a right to a certificate for a cider licence; and the existence of a wine licence a right to a certificate for a wine licence; or whether the existence of a licence for any one of the three gives a right to a certificate, not only for a licence for that one, but also for a licence for both or either of the others. Charles, J., has adopted the latter construction. The other construction is the right one.

(1) By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19: "Where, on the 1st of May, 1869, a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds in respect of which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine not to be consumed on the premises may be refused in accordance with this Act."

By s. 7 of the Act 23 & 24 Vict. c. 27: "Every person who shall be licensed to keep a refreshment house, and shall pursue therein the trade or business of a confectioner, or shall keep open such house as an eating-house, &c., shall be entitled to take out a licence to sell foreign wine by retail in such refreshment house, to be consumed on the premises where the same shall have been sold, without producing or having any other licence or authority than as aforesaid."

Sect. 10 of the Act 24 & 25 Vict. c. 91, contains a recital that doubts had arisen whether persons licensed to retail beer in England were precluded from taking out or having granted to them a licence for the sale of wine under the Act of 1860, and, for the removal of such doubts, enacts "that nothing in the said Act or in any other Act or Acts contained shall be construed to preclude any person from taking out or having granted to him any licence for the sale of wine under the said Act of 1860, by reason or on account of his being licensed for the sale of beer under any Act or Acts in that behalf."

1888

THE QUEEN v. KING.

But there is a preliminary objection to the issue of a peremptory mandamus. The justices made a return to the writ of unqualified obedience,—that they had heard and determined the matter, and had decided that the prosecutor was not entitled to a licence. This return cannot be questioned in this proceeding. Whether the justices have decided rightly or not is not the question; if they have heard and determined the matter the Court cannot review their decision by mandamus: *Reg.* v. *Mainwaring* (1), *Reg.* v. *Justices of Middlesex.* (2) There is no question of jurisdiction.

Bosanquet, Q.C., and *J. Paterson*, for the prosecutor. No doubt, if justices are required by a mandamus to hear and determine a matter, and they decide a question which is within their jurisdiction, whether they decide it rightly or wrongly, that is obedience to the writ. But, if they either decline to entertain a question which is within their jurisdiction, or deal with a question which is not within their jurisdiction, a question of jurisdiction arises which can be raised on the return to the mandamus. The question of jurisdiction can be raised just as well on a return to the mandamus as on the original application for it. *Reg.* v. *Justices of Pirehill North* (3) shews that the return of obedience to a mandamus can be pleaded to. Here the pleadings shew that the justices declined to decide the case upon any of the four grounds mentioned in s. 8 of the Act, and assumed to exercise an absolute discretion to refuse the certificate. This they had no jurisdiction to do. That was not a "hearing and determining" of the matter in obedience to the writ.

[THE COURT intimated that the appeal must be heard on the merits.]

Henn Collins, Q.C., and *R. S. Wright*, for the defendants. With regard to s. 19, the natural and grammatical construction of the words is to take them distributively. The section was only intended to preserve existing rights; it was not intended to enlarge them. On May 1, 1869, the prosecutor's predecessor had no vested right to anything but a beer licence, and that right alone is preserved by s. 19. Moreover, the application must be for a certificate for a renewal of a licence, and there can be no

(1) E. B. & E. 474. (2) 2 Q. B. D. 516.
(3) 14 Q. B. D. 13.

renewal of a wine licence which has never yet existed. Sect. 10 of the Act of 1861 only removes the supposed incapacity of a beerhouse keeper to hold a wine licence; it gives him no higher right than any other person. The object of sect. 19 was only to protect persons who had invested their capital in a particular trade, it was not intended to enlarge their rights.

Bosanquet, Q.C., and *J. Paterson*, for the prosecutor. Before the Act of 1869 the justices had no discretion to refuse a wine licence to a beerhouse keeper. This immunity is preserved by s. 19. The natural grammatical literal construction of s. 19 is that which Charles, J., has adopted, and the rule is that that construction of an Act must be followed, unless it leads to some manifest absurdity or inconsistency. The holder of any one of the three kinds of licence is made a member of a privileged class. The section cannot properly be read distributively.

Sect. 7 throws light on the construction of s. 19. Sect. 7 cannot be construed distributively. Under it a man who, having held a beer licence, applied for a wine licence, would not have to give the twenty-eight days' notice mentioned in the latter part of the section. That notice need be given only by a man who had never held any licence before.

LORD ESHER, M.R. I am of opinion that this appeal must be allowed. A mandamus was issued to justices to hear and determine an application by the prosecutor for a certificate for a wine licence. The justices pleaded by way of return to the writ that they had obeyed it,—that they had in obedience to it heard and determined the matter. The prosecutor by his plea traversed that statement, and said that the justices had not heard and determined the matter of his application. The plea stated other facts, the effect of which was to shew that the justices had professed to exercise a jurisdiction which did not belong to them. The justices replied, and, to my mind, their reply does not traverse the facts stated in the plea, but endeavours to get rid of them by that which looks extremely like a demurrer. If it is to be treated as a demurrer, it admits the facts stated in the plea, though it endeavours to get rid of them. Is it then true that when justices, in their return to a mandamus commanding them

1888

THE QUEEN v. KING.

Lord Esher, M.R.

to hear and determine a matter, state in general terms that they have obeyed the writ, no answer can be made to their return, but it is absolutely binding on the Court? The question was brought before the Court of Appeal in *Reg.* v. *Justices of Pirehill North* (1), which determined that some answer can be given to such a return, as, for instance, a traverse of the fact that the justices had heard and determined the matter. But the judgment in that case went further. It said that the statute 9 Anne, c. 20, had been replaced by rules and orders which, on their true construction, had left untouched the right to make some answer to the return. It was pointed out that otherwise justices, who might think that they were deciding a case justly, would be able to remove from the consideration of the Court the question whether they had decided according to law, except by putting the parties to great expense in order to raise in another proceeding a question which might be conveniently determined at that stage. That case decided that some answer could be given to such a return to a mandamus. To what extent the answer may go is another question. If the plea admits that the justices did hear and determine the matter, but says that they determined it wrongly, either in law or in fact, that would be no answer at all. But, if the plea traverses the fact that the justices did hear and determine the matter, that would be a good answer. Can the plea go further than that? I think it can. If it shews that the justices declined to exercise a jurisdiction which does belong to them, and assumed to exercise a jurisdiction which does not belong to them, it seems to me that it would shew that they had not really heard and determined the matter. They would not have determined anything within their jurisdiction. If the plea in the present case shews that the justices declined to enter upon any of the four matters mentioned in s. 8 of the Act of 1869 which were within their jurisdiction, and decided the case upon another ground as to which they had no jurisdiction at all, I think it raises a question of jurisdiction. If on the true construction of the Act the justices had jurisdiction to refuse the certificate only upon one or more of the four grounds mentioned in s. 8, and they declined to enter upon those grounds, I think the plea would be good and the

(1) 14 Q. B. D. 13.

return bad. In my opinion the true construction of the plea is, that the justices did not enter upon any of the four grounds of refusal, but, declining to do so, did enter upon another matter, and decided the case on that ground. The allegation in the plea that the justices "wholly refused" to determine the application on any of the four grounds, and did refuse it upon some other ground, is not traversed by the reply, and it must be taken that the justices did refuse to entertain any of those four grounds, and entered upon another matter.

The question, therefore, for our decision is, whether, on the application before them the justices had jurisdiction to enter on any other matter than the four grounds of refusal mentioned in s. 8. In other words, we must decide what jurisdiction the justices had under s. 19. I do not think that s. 10 of the Act of 1861 either assists or derogates from the argument on either side. That section only declares what, in the opinion of the legislature, was the true construction of the previous Act of 1860. A merely declaratory section does not make any new enactment; it only declares that the true construction of a former enactment is that which the legislature says it is. Sect. 10, therefore, leaves matters as they were under the Act of 1860, and we must decide what is the true construction of s. 19 of the Act of 1869. On the one side, it is said that the true construction is, that if a man on May 1, 1869, held a licence to sell cider, or a licence to sell beer, or a licence to sell wine, he is entitled thereafter, not only to a a renewal of the licence which he then held, but also to a certificate for a licence for one or both of the other kinds of liquor, unless he fails to comply with one or more of the conditions mentioned in s. 8. On the other side it is said, that if, on May 1, 1869, a man held a licence for one of the three kinds of liquor, he is entitled to a renewal of that licence, but not, as a matter of right, to a certificate for either of the other two. Such a certificate would not operate as a renewal of a licence which he had before, but as a grant of a new licence, and therefore the justices would have an absolute discretion whether they should grant it or not. It was urged for the prosecution that we ought to follow the ordinary grammatical construction of the section, unless that construction would produce an absurdity or a manifest contradiction.

1888

THE QUEEN v. KING.

Lord Esher, M.R.

I agree that we ought to do so. It was, however, assumed that the ordinary grammatical construction of s. 19 is in favour of the prosecution, but, in my opinion, it is not. When in the English language a conjunction, either conjunctive or disjunctive, is used, you must in order to get at the true construction of the language divide it into as many separate sentences as the conjunction applies to. Sect. 19 deals with three cases, and it seems to me that, following the ordinary English usage, the legislature, in order to save the trouble of repeating the sentence, have joined all three cases together by the disjunctive conjunction "or." Of course "beer, cider, or wine" means the same thing as "beer, or cider, or wine." Then, if the section be divided into separate sentences, it will read thus: "Where on May 1, 1869, a licence is in force for the sale of beer, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, except upon one or more of the grounds, &c.: Where on May 1, 1869, a licence is in force for the sale of cider, it shall not be lawful for the justices to refuse an application for a certificate for the sale of cider, except, &c.: Where on May 1, 1869, a licence is in force for the sale of wine, it shall not be lawful for the justices to refuse an application for a certificate for the sale of wine, except, &c." Each of the three cases mentioned must be disjoined from the other two, and then it comes to this, that if a man held a beer licence on May 1, 1869, and after the passing of the Act he applies for a certificate for a renewal of it, his application cannot be refused, except upon one or more of the four grounds mentioned in s. 8. And in the same way with regard to the holder of a cider licence, and the holder of a wine licence. Each case is to be considered by itself, and the fact that a man held a licence for beer does not in the least interfere with or affect his application for a certificate for either cider or wine.

It was said that s. 7 shews that this cannot be the true construction of s. 19. In my opinion s. 7 does not assist the argument for the prosecutor. In my view on the true construction of s. 7 a man who had had a licence for the sale of beer only, and who desired to obtain also a licence for the sale of wine, must give the notices required by s. 7 in the case of an entirely new application. It seems to me that s. 7 must be construed distributively equally with s. 19.

But, even if I am wrong in that view, is it so clear that it ought to be construed in the other way that it can assist us in construing s. 19? We should be asked to solve one puzzle by solving another. The case, therefore, comes to this. The justices have the same discretion as if any other person was applying for a wine licence for the first time. They have an absolute discretion to consider all the circumstances, and to refuse the application if they think fit to do so, and they have not exceeded their jurisdiction. I cannot agree with the construction which Charles, J., has put on s. 19. The justices have, in my opinion, dealt with the matter properly, and, whether we should or should have not come to the same conclusion, we have no power to interfere.

FRY, L.J. The justices have relied upon two grounds. First, that they have made a return of unqualified obedience, and that that is a conclusive answer to the mandamus, except by way of trial. However that may be, it appears to me that on the present appeal they have not based their case upon an unqualified return of obedience. The prosecutor in his plea stated the facts, and alleged that the justices had determined the case, and had refused his application, upon a ground not one of the four specified in s. 8, and that it was not open to them to consider anything but those four grounds. The justices replied that the plea was "bad in law in substance, on the ground that the matters therein alleged did not entitle the prosecutor to the certificate, or disentitle the defendants from refusing such certificate, except upon one or more of the four grounds therein mentioned." The reply raised very neatly the precise point of law, and shewed that the justices had determined the case upon a ground outside their jurisdiction, if they are confined to the four grounds specified in s. 8. After that reply it seems to me that it is impossible for them to rely upon the return of unqualified obedience to the writ.

The question, therefore, arises whether the justices were confined to those four grounds, and that turns upon the construction of s. 19. In order to construe it correctly we must consider two things, (1) how matters stood at the time when the Act of 1869 was passed, and (2) the general scope and object of the Act. How did matters stand prior to the Act? Briefly stated, there were two

1888

THE QUEEN v. KING.

Fry, L.J.

kinds of licences,—licences for public-houses, the granting of which was in the absolute discretion of the justices, and another class of licences, which were granted by the excise, to which every applicant was entitled, provided that he could satisfy certain specified conditions. The second class was subdivided into three —viz., beer licences, cider licences, and wine licences which were granted under the Act of 1860 to persons who kept refreshment rooms. Then the preamble to the Act of 1869 contains a recital, that it is expedient to make better provision with regard to the granting of excise licences, and the Act gives effect to that object by vesting in the justices the power to grant the licences which had been previously granted by the excise, and by giving the justices the same discretion as they had with regard to the granting of other licences. That is the general scope of the Act. Then comes s. 19, and, in my opinion, the object of that section was to save what might be called the moral rights of those persons who might have altered their mode of life, and expended their money, on the faith of the possession of one or other of the excise licences, and the legislature fixed May 1, 1869, as the date for ascertaining those rights. I think the general scope of s. 19 was to give a continuity of life to each of those three kinds of licences, in regard to houses for which they were in force on May 1, 1869. But, in my opinion, it was not intended to give to the holder, for instance, of a licence to sell cider a right to have also a licence to sell wine, or, vice versâ, to the holder of a wine licence the right to have also a cider licence, except upon the same terms as any other of Her Majesty's subjects. The peculiar object of s. 19 was to give a continuity of life to excise licences already existing on May 1, 1869.

With regard to the language of the section, I entirely agree with the view which has been expressed by the Master of the Rolls. The section contemplates three possible events as existing on May 1, 1869—that there may be existing at that date, beer licences, cider licences, and wine licences, and that applications may be made by the holders of those licences for renewals of them, and it prohibits the justices from refusing certificates to those holders, except on one or more of certain specified grounds. That is the general structure of the section. I think

that nothing is more natural than to read the section reddendo singula singulis, and it seems to me that that is the proper construction of it. I entirely agree that the words ought to be read according to their ordinary use in the English language; but, having regard to the object of the section, I think that the construction which I have mentioned is the natural one. I am unable, therefore, to agree with the view taken by Charles, J.

It was pressed upon us that s. 10 of the Act of 1861 gave to the keeper of a beerhouse some special right to a certificate for a wine licence. I cannot agree in that view of s. 10. A doubt had existed whether the keeper of a beerhouse could, under any circumstances, be entitled to a wine licence, and that doubt was removed by s. 10. But s. 10 does not give to the keeper of a beerhouse any right to a wine licence; it merely prevents him from being precluded from applying for it by the fact that he does keep a beerhouse.

LOPES, L.J. I am of opinion that a return of absolute obedience to a mandamus to justices to hear and determine a matter can be questioned by plea in certain cases. If the plea set up that the justices had determined the matter wrongly, it would be bad. If, on the other hand, it said that the justices did not hear and determine the matter, it would be good. If it set up that the justices declined to exercise a jurisdiction which they had, and professed to exercise another jurisdiction which they did not possess, that, I think, would be good. If the plea in the present case shews that the justices declined to consider whether their jurisdiction was limited to the four grounds of refusal specified in s. 8, I think it would be good, and, in my opinion, having regard to the pleadings, that is what the justices really did.

With regard to the construction of s. 19, speaking for myself alone, I cannot say that I feel much difficulty in its language, and, but for the decision of Charles, J., I should have said it was clear, at any rate clear for an Act of Parliament. It appears to me that the object of the legislature was to preserve then existing interests. Licences existing on May 1, 1869, whether for beer, or cider, or wine, were to be renewed, and the renewal was to be refused only upon one of the four grounds specified in

1888

THE QUEEN v. KING.

Lopes, L.J.

s. 8. The renewal of a beer licence was not to be refused except upon one of those four grounds; the renewal of a cider licence was not to be refused except upon one of those four grounds; the renewal of a wine licence was not to be refused except on one of those four grounds. But it seems to me impossible to hold that the true construction is, that a man, who had a vested interest in a licence for one of the three liquors, was to have a vested right to obtain also a licence for either of the other two.

Appeal allowed; judgment for the defendants on the mandamus, with costs in both Courts.

Solicitors for justices: *Peacock & Goddard*, for *Higson & Son*, Manchester.

Solicitors for prosecutor: *Radford & Frankland*, for *Bowden & Walker*, Manchester.

W. L. C.

Feb. 7, 15.

[IN THE COURT OF APPEAL.]

THE REV. C. A. STEVENS, APPELLANT; BISHOP, RESPONDENT.

Income Tax—Tithe Commutation Rent-charge—"Annual Value"—Expenses of Collection—5 & 6 Vict. c. 35—16 & 17 Vict. c. 34.

In estimating the "annual value" of tithe commutation rent-charge for the purpose of charging the owner thereof with property tax under 16 & 17 Vict. c. 34, s. 32, the amount necessarily expended by him in collection of the tithe rent-charge must be deducted.

APPEAL from the judgment of the Queen's Bench Division upon a case stated by Income Tax Commissioners.

The facts are stated in the report of the case in the Court below (19 Q. B. D. 442). They were briefly as follows:—

The Rev. C. A. Stevens had appealed against an assessment of income or property tax made upon him in respect of vicarial tithe commutation rent-charge received by him on the ground that he was entitled to a deduction from the amount upon which he had been so assessed in respect of the expenses incurred by him in the collection of the said tithe rent-charge.

The Commissioners of Income Tax, being of opinion that the deduction so claimed by him was not admissible, dismissed the appeal, but stated a case for the opinion of the Court.

It was admitted in the Court below by the counsel for the respondent (the surveyor of taxes) for the purposes of the case that the expenses in respect of which the deduction was claimed were expenses which the appellant had necessarily and properly incurred in order to realize his tithe rent-charge.

The Court below (A. L. Smith and Grantham, JJ.) gave judgment for the appellant (1), holding that he was entitled to have the amount of these expenses deducted.

Sir E. Clarke, S.G., and *Dicey*, for the respondent. It is contended that property tax is chargeable on the gross annual value of the tithe commutation rent-charge subject to the deductions expressly authorized by the 32nd section of 16 & 17 Vict. c. 34, but not to any deduction in respect of expenses of collection. The 16 & 17 Vict. c. 34, s. 32, is the enactment under which the tithe-owner is assessed, and by Schedule A. of that Act the charge is imposed on "the annual value" of all lands, tenements, hereditaments, and heritages. The question is, what is the meaning of "annual value" as applied to tithe commutation rent-charge. Previously to that Act, under the Act of 1842, 5 & 6 Vict. c. 35, the owner of the tithe commutation rent-charge was not assessed in respect thereof. It was assessed as part of the annual value of the land and the duty was paid in the first instance by the occupier of the land or the landowner under schedule A.: see Schedule A., No. IV., rule 4. It is clear that under that Act the charge was on the gross annual value. 16 & 17 Vict. c. 34, s. 5, enacts that the duties granted by that Act shall be assessed under the regulations and provisions of the Act of 1842 (5 & 6 Vict. c. 35). It will be contended that the effect is, that the provisions of 5 & 6 Vict. c. 35, Sched. A., No. I. (the General Rule for estimating lands, tenements, hereditaments, or heritages), apply, and that the annual value must be the rack rent at which the tithe commutation rent-charge would let by the year. But that rule is inapplicable, as it in terms applies only to hereditaments which are capable of actual occupation. It never could have been intended that the basis of assess-

(1) The terms "appellant" and "respondent" are used throughout with reference to the position of the parties in the Court below.

1888

STEVENS v. BISHOP.

ment should be different when the subject-matter is assessed in the hands of the owner of the tithe rent-charge from what it would have been if the assessment had been on the occupier or owner of the land. Schedule A., No. II., appears to deal only with tithes in kind and tithes compounded other than tithe commutation rent-charge, but, assuming it to apply, the question must be as to the meaning of "profits" under that rule. The word "profits" in relation to income tax is not to be construed according to the politico-economical or mercantile sense of the word: *Coltness Iron Co.* v. *Black* (1), see Lord Blackburn's judgment at p. 329. The statute specifically allows certain deductions which it would be unnecessary expressly to allow if the word "profits" were to be taken in that sense, because such deductions in that case would necessarily be implied. It is contended that the true construction of the Acts is, that the "annual value" of tithe commutation rent-charge for the purposes of Schedule A. of 16 & 17 Vict. c. 34, must be the gross annual value as under the former Act, subject to the specific statutory deductions mentioned in the 32nd section of 16 & 17 Vict. c. 34. The provisions of Schedule A., No. IV., rules 4, 9, and 10, shew that the basis of assessment of tithe commutation rent-charge was the gross annual value under the Act of 1842; and under the 190th section, schedule G., of that Act, which provides for the returns to be made, it is clear that the gross value has to be returned. The return mentioned in s. 32 of the Act of 1853 must be on the same basis.

Meadows White, Q.C., and *Tyrrell Paine*, for the appellant. The 16 & 17 Vict. c. 34, s. 32, puts the assessment of the duty on tithe commutation rent-charge on a fresh basis. Under that section the tithe-owner is chargeable in respect of the tithe commutation rent-charge like the owner of any other hereditament under Schedule A., No. I., of the Act of 1842. An ordinary landowner does not pay on rent which he cannot receive, but the Crown in this case contends that the owner of the tithe rent-charge is to pay on what he never can receive, inasmuch as it is admitted that these expenses are absolutely necessary to realize the rent-charge. The 5th section of the Act of 1853 (16 & 17 Vict. c. 34), applies

(1) 6 App. Cas. 315.

to the duties under that Act the regulations and provisions of the Act of 1842. It is contended that Schedule A., No. I., of the former Act applies, and that the assessment is therefore to be on the rack-rent at which the rent-charge would let by the year, which would necessarily be arrived at after allowing for the expenses of collection. The term "actually occupied" may be applied in legal phraseology to tithe rent-charge without any great difficulty; for the purposes of poor-rates, the owner of tithe rent-charge is considered as occupying at a rent, the Parochial Assessment Act 6 & 7 Wm. 4, c. 96, making the rent the basis of assessment in all cases: see *Reg.* v. *Goodchild.* (1) If Schedule A., No. II., applies, it is contended that before arriving at "profits" these expenses must clearly be deducted. If the case of tithe commutation rent-charge comes neither within Schedule A., No. I., nor Schedule A., No. 2, there is no rule by which the annual value is to be ascertained, which cannot have been intended. No argument against the appellant's contention arises from the fact that the Acts allow specifically the deduction of rates, &c. The expenses of collection are not deductions within the meaning of the term as used in the Acts. They are something which must be allowed before arriving at the subject-matter of assessment.

Dicey, in reply.

Cur. adv. vult.

Feb. 15. The following judgments were delivered:—

LORD ESHER, M.R. In this case the clerical owner of a tithe commutation rent-charge has been assessed to income tax; and the question raised is as to the proper mode of ascertaining for the purposes of such assessment the annual value of the subject-matter, and whether the expenses of collection are to be deducted in arriving at such annual value.

The charge is imposed upon the owner of the tithe commutation rent-charge under the 32nd section of the Act of 1853. That section provides that, in assessing and charging the duties under Schedule A. of the Act in respect of lands, tenements, or hereditaments subject to any rent-charge under the Act for the commutation of the tithes in England, it shall be lawful for the

(1) E. B. & E. 1.

1888

STEVENS v. BISHOP.

Lord Esher, M.R.

Commissioners acting in the execution of the Act, if they shall think fit, on a due return of such rent-charge being made by the owner thereof in order to an assessment upon him, to charge and assess such owner in the assessment for the said parish with the duty under Schedule A. of this Act in respect of such rent-charge, deducting therefrom the amount of parochial rates, &c. It was not disputed that a return was made under that section by the owner of the tithe rent-charge, and that he was assessed under that section, and the provisions of that Act therefore must be those which regulate such assessment. By s. 5 of the Act it is provided that the duties thereby granted shall be assessed, raised, levied, and collected under the regulations and provisions of the earlier Act, 5 & 6 Vict. c. 35. The effect, therefore, must be that the regulations and provisions of that earlier Act with regard to the assessment of the duties therein mentioned must be read into the later Act, and apply to the duties thereby granted. They must, therefore, apply to the assessment of the duty on the owner of tithe commutation rent-charge. Whether the words of the former Act are exactly appropriate to the particular subject-matter of the later Act is immaterial, for whatever the provisions are they are declared applicable. We are, therefore, driven to Schedule A. of the Act 5 & 6 Vict. c. 35, as being the enactment which must regulate this assessment. It seems that No. I. and No. II. of Schedule A. are the only parts of the schedule under which it could be suggested that the subject-matter of this assessment could possibly come. In my opinion No. I. is the rule which is applicable. That provides that "the annual value of lands, tenements, hereditaments, or heritages charged under Schedule A. shall be understood to be the rent by the year at which the same are let at rack-rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment, but, if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, and hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, or of whatever value, except

the properties mentioned in No. II. and No. III. of this schedule." It was urged that this provision cannot apply, because tithe rent-charge cannot be said to be capable of "actual occupation." In answer to this suggestion two views present themselves. One is, that the latter part of the provision is not exhaustive. The rule only says that the provision shall extend to all lands, tenements, &c., capable of actual occupation, but it does not in terms confine it to such: but I do not think it is necessary to rely on that view. The other view is that, even if a tithe rent-charge is not capable of actual occupation, and so primâ facie the words of the provision would not be applicable to it, the express provision of the Act of 1853 is that the regulations of the earlier Act shall apply to the subject-matter of assessment under the later Act. If that is so, we must apply the words of the earlier Act though it may be difficult to do so, and if necessary strike out the word "actual" for that purpose. It follows that this case must be brought either within No. I. or No. II. of Schedule A. of the Act of 1842. I do not think that tithe commutation rent-charge comes within any of the provisions of No. II., and therefore it follows that it must come within No. I. Other parts of the schedule were referred to in support of the respondent's contention, for instance the 9th and 10th rules of No. IV. But either the provisions there contained do not appear to apply to the case where the owner of the tithe rent-charge is assessed, or, if they do, they do not seem to me to affect the basis on which the assessment is to be made which, as I have said, in this case must be according to the provisions of No. I., but only the mode in which the assessment to be made according to No. I. is to be carried out. Similar considerations appear to me to apply to the provisions of s. 190 of the Act of 1842, Schedule G., upon which reliance was placed for the respondent. I am of opinion that No. I. of Schedule A. is made to apply to this case by the express terms of s. 5 of the Act of 1853. Whether or no the provisions of No. I., apart from the enactment of the Act of 1853, could be construed as applicable to the case of tithe rent-charge is immaterial, if we come to the conclusion that the legislature has directed us to read them as applicable. It follows that the question is at what amount the subject-matter of

1888

STEVENS v. BISHOP.

Lord Esher, M.R.

assessment would let by the year at a rack rent? It must be observed that the deduction here claimed is not of optional expenses of collection, which might be looked on as a luxury; it may be that a case, where the rent-charge could be collected without incurring such expenses, but the owner preferred to employ some one to collect it, might admit of different considerations. I should be disposed myself to think that in all cases, where in the ordinary course of things a collector would be employed, the deduction for the expenses of collection ought to be allowed. But the facts here go further than that: it is admitted that the amount of the rent-charge could not be realised without these expenses of collection being incurred. I can have no doubt that in fixing the rent which he would give for such property as that in question the tenant would take into account the expenses which he must necessarily incur in collection. For these reasons I am of opinion that the judgment of the Court below was right, and that this appeal should be dismissed.

FRY, L.J. I am of opinion that under the statute of 1842 tithe rent-charge was not an hereditament charged under rule No. I. of Schedule A. as a separate hereditament, but that it was assessed as part of the annual value of the lands, and was (under No. IV., rule 4), assessable either on the occupier of the land or on the person liable to pay the rent-charge, i.e., to speak popularly, either the farmer or the landlord: that it could not be assessed on the rector or vicar, and that it was assessed on the gross amount of the rent-charge.

This was altered by the statute of 1853 to this extent, that the Commissioners were authorized to assess the rent-charge on the rector or vicar under Schedule A.: and by s. 5 the earlier statute of 1842 was made applicable to the income-tax under the later Act. For the first time, then, the rent-charge is treated as a separate and independent hereditament chargeable as such under Schedule A. on the occupant or quasi-occupant of the hereditament, i.e., on the rector or vicar: and, if it is to be so chargeable, it appears to me that the annual value can be ascertained only in the way pointed out by the general rule No. I., i.e., by treating the annual value as equal to the annual rent when the property

is let at a rack-rent, and, if not, then at the rack rent at which the same is worth to let by the year.

It tends to confirm this conclusion that the statute of 1853 itself appears to shew an intention that the amount to be charged under the new method of assessment, i.e., on the recipient of the rent-charge, should be different from that received under the older methods. I refer to the provision as to the deduction of parochial rates, and the special provisions as to deductions in Ireland.

I conclude, then, that on the method of assessment followed in the present case, seeing that the tithes were not let, we must find the rack-rent at which they would let; and this clearly could not exceed their gross amount less the reasonable remuneration for collection. I hold, therefore, that the deduction was rightly claimed by Dr. Stevens, and that this appeal should be dismissed.

LOPES, L.J. I think that the combined effect of the 32nd section of the Act of 1853 and Schedule A. of that Act is that the tithe commutation rent-charge is to be assessed on the annual value thereof. The question therefore arises how that annual value is to be ascertained. Sect. 5 of the Act provides that the duty shall be assessed, raised, levied and collected under the regulations and provisions of the Act 5 & 6 Vict. c. 35, and so we are driven to Schedule A. of that Act, No. I., for the definition of annual value. That rule says that the annual value of lands, tenements, hereditaments or heritages charged under Schedule A. shall be understood to be the rent by the year at which the same are let at rack rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment, but, if the same are not so let at rack rent, then at the rack rent at which the same are worth to be let by the year. We have therefore, in my opinion, to consider at what rent this tithe rent-charge could be let by the year. It is obvious that it would be let at an amount calculated upon the assumption that the necessary costs of collection were to be deducted. I think, therefore, that the expenses of collection ought to be

1888

STEVENS v. BISHOP.

deducted, and that the judgment of the Queen's Bench Division was right.

Appeal dismissed.

Solicitors for appellant: *White, Borrett & Co.*

Solicitor for respondent: *Solicitor for Inland Revenue.*

E. L.

Feb. 11.

[IN THE COURT OF APPEAL.]

TUNNICLIFFE AND OTHERS, APPELLANTS; OVERSEERS OF BIRKDALE, RESPONDENTS.

Poor-rate—Rateability of Premises occupied as certified Reformatory School—Reformatory Schools Act, 1866 (29 & 30 *Vict. c.* 117), *s.* 4.

A reformatory school, which has been certified under the Reformatory Schools Act, 1866, is rateable to the poor-rate.

Sheppard v. *Bradford* (16 C. B. (N.S.) 369; 33 L. J. (M.C.) 182) overruled.

APPEAL from the judgment of the Queen's Bench Division upon a case stated by the Lancashire Quarter Sessions upon appeal against a poor-rate.

The facts are sufficiently stated in the report of the case in the Court below. (1)

The question raised by the case was whether the appellants, the managers of a reformatory school which had received a certificate under the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 4), were liable to be rated in respect of the school buildings.

The Queen's Bench Division (Day and Wills, JJ.) held that the appellants were liable and affirmed the order of sessions confirming the rate.

Sir C. Russell, Q.C., and *Segar*, for the appellants.

Aspland, Q.C., and *Melsheimer*, for the respondents.

The arguments were substantially the same as those in the Court below.

LORD ESHER, M.R. In this case the question is whether a reformatory school such as this, regulated as it is in certain

(1) 19 Q. B. D. 280.

respects by statutory provisions, is rateable to the poor-rate. It is argued that it is not so, because it is in effect a prison, and therefore part of the machinery for the public administration of law and order in the country. But whether this is a prison or not does not seem to me to be the question. No exemption is given to prisons, merely because they are prisons, but the exemption is because they are prisons belonging to the Crown, and are, so far as they can be said to be occupied by anybody, occupied by servants of the Crown.

The question, therefore, is not whether this is a prison, but whether, if a prison, it is such a prison as can be said to be exempt on the ground that it is occupied by servants of the Crown. For the purpose of deciding such a question as this the first case it is necessary to consider is the *Mersey Docks Case.* (1) It is necessary to see what construction was there put on the Act creating the liability to be rated; for in that case it was held that the Courts inferior to the House of Lords had in previous cases partially misconstrued or, at any rate, partially misapplied, the provisions of the Act, and the House of Lords brought back the Courts to the true construction of the Act of Elizabeth. The construction that was there put upon the Act was that it imposes the liability to be rated on every occupier of land, houses, &c., of which the occupation would be beneficial in the hands of any ordinary occupier, and that the only exemption from that general liability is that of the Crown, which arises only from the fact that the Crown is not named in the statute and therefore is not affected by it. The statement of the law by Westbury, L.C., seems to be to that effect, but the language of Lord Cranworth is that which is generally quoted as being the clearest exposition of the grounds of the decision. He says: "To avoid all misconception, I wish to add that there are certain cases to which the observations I have made do not apply. The Crown, not being named, is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown or by servants of the Crown for the purposes of the Crown are not liable to be rated: and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown

(1) 11 H. L. C. 443.

1888

TUNNICLIFFE v. OVERSEERS OF BIRKDALE.

Lord Esher, M.R.

that this mistake has arisen." I think the words "by servants of the Crown," were used by Lord Cranworth to prevent any misapprehension of the meaning of the words "occupied by the Crown" and to prevent its being supposed that the exemption was confined to lands or houses in the personal occupation of the Sovereign. It seems to me that his meaning is that the exemption extends to all lands or houses which are occupied by the servants of the Sovereign in his sovereign capacity, in such wise that the occupation by them is, as in the case of the occupation of houses or lands by servants of a private individual, the occupation not of the servants but of the master.

Taking the whole of what the learned Lords said together, the logical result seems to be that, the Crown not being bound because not named in the statute, lands or houses occupied by the Crown, or by the servants of the Crown in its sovereign capacity, are not rateable. It is true that Blackburn, J., in delivering the opinion of the majority of the judges at pp. 463, 464, refers to cases in which the exception seems to have been carried further, but I do not think his statement of the principle differs from that contained in the judgments of the House of Lords. He says: "The Crown not being named in the statute of Elizabeth is not bound by it." So far he makes the exemption depend on the same principle as that stated by Lord Cranworth. But he then goes on to enumerate certain cases, in which there had been decided to be an exemption, in order to see how far they could be brought within that principle. He says: "So far the ground of exemption is perfectly intelligible, but it has been carried a good deal further and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. Long series of cases have established that, where property is occupied for the purposes of the government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation." He then refers to property occupied by the local police, county buildings occupied for the assizes, and judges' lodgings, or occupied as a county court, and says, "in these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sove-

reign so as to make the occupation that of Her Majesty: but the purposes are all public purposes of that kind which by the constitution of this country fall within the province of government and are committed to the Sovereign, so that the occupiers, though not strictly servants of the Sovereign, might be considered in consimili casu." The learned judge, therefore, attempted to bring those cases within the principle, which he states in exactly the same terms as the learned Law Lords. If, therefore, at any time since the decision in the *Mersey Docks Case* (1), in any such case as was mentioned by the learned judge, it has been held that there is an exemption, or if there has been in the case of any particular class of buildings so long a series of decisions declaring them exempt, that no Court, not even the House of Lords, would now overrule them, such cases must be considered not as establishing any new principle, but as having been decided to come in some way or another within the principle laid down in the *Mersey Docks Case.* (1) In the case of any particular buildings hereafter alleged to come within the latter class of cases mentioned by Lord Blackburn, it will be necessary to consider how far the Court may be concluded by any decision of a Court of superior or co-ordinate jurisdiction with regard to such buildings, or whether there has been such a long series of decisions either before or after the decision in the *Mersey Docks Case* (1), or such a long course of practice founded on a decision of the Courts of Law with regard to such buildings, that to hold such buildings liable to be rated would amount to a revolutionary change of practice: for it is a general rule of conduct acted on by Courts of Appeal that, where there has been a long series of decisions or a long course of practice adopted in reliance on a legal decision laying down the law in a certain way, the Court will be very unwilling to overrule the law so laid down. But, except in cases where the Court may be so concluded from saying that they are not within the strict rule laid down in the *Mersey Docks Case* (1), I think that rule must be applied, viz., that the only exemption is where the Crown is the occupier, that is to say, where the Crown is personally in occupation, or in occupation by persons who are in the position

(1) 11 H. L. C. 443.

1888

TUNNICLIFFE v. OVERSEERS OF BIRKDALE.

Lord Esher, M.R.

of servants of the Crown, and therefore do not occupy for themselves. The true general rule seems to me to be that there is an exemption only in cases where, if any one were to be rated for the premises, it would be the Crown. Where the property is occupied by the servants of the Crown as such, of course such servants could not be rateable, for they do not occupy for themselves; they only hold and manage the property for the Crown like the servants of an ordinary master whose occupation is not their own in law, but their master's: the Crown itself would be rateable, if any one were. Various authorities have been cited on the subject. One was *Reg.* v. *West Derby* (1), which was the case of an industrial school. In that case Blackburn, J., himself refers to the judgment of Lord Cranworth as laying down the principle of the exemption to be that only land or buildings which could be treated as being in the occupation of the Crown were exempt, on the ground that the Crown not being named in the statute is not bound by its provisions. In the case of *Coomber* v. *Justices of Berks* (2), the question was whether buildings used for assize courts and purposes in connection therewith were liable to pay income tax, and that question was stated to turn upon similar considerations to those affecting the question of rateability. It was held that such buildings were not liable: but the case does not, I think, lay down any new principle or in any way enlarge the principle laid down in the *Mersey Docks Case.* (3) Lord Blackburn, in giving judgment quoted the judgment of Westbury, L.C., in the *Mersey Docks Case* (3), and he appears to me to have treated the question as being whether the occupation could be considered to be by servants of the Crown on behalf of the Crown. Lord Watson said, speaking of the definition given by Westbury, L.C., in the *Mersey Docks Case* (3), "the precise language of that definition satisfies me that the noble and learned Lord meant to affirm, and did affirm, that the exemption extended not only to the immediate and actual servants of the Crown, but to all other persons not being servants of the Crown whose occupation was ascribable to a bare trust for purposes required and created by the government of

(1) Law Rep. 10 Q. B. 283. (2) 9 App. Cas. 61.
(3) 11 H. L. C. 443.

1888

TUNNICLIFFE v. OVERSEERS OF BIRKDALE.

Lord Esher, M.R.

the country." With deference, the language there used is not quite accurate, for there can be no question of any exemption to servants of the Crown; for in the case supposed, their occupation being that of servants, they could not in any case be rateable, and therefore cannot be said to be exempt. What no doubt is meant is, that the exemption extends not only to cases of occupation by the Crown, through its immediate and actual servants, but also to cases where the building is a public building occupied and used for purposes of government by persons who must be considered as servants of the Crown, because entrusted with the performance of duties forming part of the functions of the Sovereign, and whose occupation therefore constitutes for this purpose occupation by the Crown. The case of *Sheppard* v. *Bradford* (1) has been cited, in which it was held that a reformatory school substantially similar to that now in question was not rateable. This case was decided before the *Mersey Docks Case* (2), and there does not appear to have been any long series of cases on the subject in which that decision was acted on, or any continued course of practice founded on the decision which has been recognised or uncontested for a long period. It seems to me, therefore, that the case of *Sheppard* v. *Bradford* (1) must be considered as overruled by the *Mersey Docks Case* (2), unless the buildings there in question could be brought within the strict rule laid down by the House of Lords. In *Reg.* v. *West Derby* (3) Lord Blackburn seems to have treated it as overruled.

The result is, as it seems to me, that the question we have to determine is, whether this school, looking to the interpretation of the statute of Elizabeth given by the *Mersey Docks Case* (2), can be said to be exempt as being in the occupation of the Crown. For myself I think it might be said to be a prison. It is used merely for the purpose of dealing with young persons convicted of crime and sentenced to be kept there as part of their sentence on conviction. I think it is a prison in such a sense that, if the old rule acted on before the *Mersey Docks Case* (2) were still applicable, it would have been sufficiently shewn to be a building used for public purposes and for the general administration of

(1) 16 C. B. (N.S.) 369. (2) 11 H. L. C. 443.
(3) Law Rep. 10 Q. B. 283.

1888

TUNNICLIFFE v. OVERSEERS OF BIRKDALE.

Lord Esher, M.R.

the country to come within that rule. But it is not sufficient now to shew that a building is used for public purposes. The question is whether this building is occupied by the Crown or by the servants of the Crown in such wise that their occupation is that of the Crown. In other words, is it such a building that if it were subject to a rate, the Crown would be the person to be rated? The circumstances with regard to this school have been fully discussed, and it is unnecessary for me to state them in detail. In my opinion they conclusively shew that the building cannot be said to be occupied by the Crown or by servants of the Crown. Certain statutory provisions were enacted with regard to such schools by 29 & 30 Vict. c. 117; but I see nothing in the Act which makes those having the possession and management of the school servants of the Crown. The school was instituted by benevolent persons; it is managed by a committee appointed by them; and those in charge of the school were appointed and can be dismissed by such committee, and are in the position of their servants. The Crown has certain powers with regard to the management of the convict children detained in the building; but it has no power over the building. All it can do is to withdraw the certificate if anything is done with the building without the sanction of the Crown; the Crown is not in any way in possession or occupation of the building. For these reasons the case does not seem to me to come within the only exception which, according to the rule laid down in the *Mersey Docks Case* (1), can now be admitted to the general liability imposed by the statute of Elizabeth. The decision of the Court below was therefore right, and should be affirmed.

FRY, L.J. I am of the same opinion. It seems to me that the effect of the *Mersey Docks Case* (1) has been to recall the Courts, after a very long interval, to the words of the Act of Elizabeth. That Act imposes the liability to assessment on every occupier in the parish, the only exception being the Crown, which is excepted because not named in the statute. The occupation of the Crown may of course be the personal occupation of the sovereign, as to which no question here arises; but it may

(1) 11 H. L. C. 443.

also be in other modes; as for instance where the lands or buildings are occupied by the servants of the Crown exclusively for the purposes of the Crown; and there may be other cases in which the occupation, though not strictly speaking by servants of the Crown, may be the occupation of the Crown. I repeat, however, that the rule is that, in order to maintain the exemption claimed, it must be shewn that the occupation is that of the Crown. Now who are the persons charged in the present case as occupiers of the building now in question? They are the committee of management of a reformatory school. They are the persons entrusted with the carrying on of an enterprise begun by benevolent persons, anxious to benefit and reform convicted children by means of an institution established and carried on for their welfare. By virtue of the legislation on the subject the managers of reformatory schools are enabled to receive contributions both from the funds of the county and from the consolidated fund. They are also clothed with certain powers, which but for the legislation they would not have possessed. They have a right to detain the children committed to their care. Speaking for myself, I should be sorry to call a reformatory school a prison. I do not think that the legislature intended to class such schools with prisons. The object of the school is not so much punishment as reformation, though of course the children are subject to detention. But this point seems to me to be immaterial. The committee of management are the nominees of the subscribers; they are not appointed or dismissible by the Crown. They are not bound to take any child that the Crown may tender for reception. It is impossible to say under these circumstances that they are servants of the Crown. It is argued that, although they may be volunteers, they are carrying into effect a public purpose; that they have delegated to them the duty of carrying into effect sentences passed by the constituted authorities of the country. It should be borne in mind, however, that the sentence of detention in a reformatory was a new sentence invented by the legislature when they were minded to avail themselves of private effort for the reformation of juvenile criminals, and not a punishment previously known to the law; it is only a sentence which gives certain powers to the

1888

TUNNICLIFFE v. OVERSEERS OF BIRKDALE.

FRY, L.J.

managers who choose to accept the convicted children as subjects for reformation. I do not think the managers can be said in any sense to be servants of the Crown. Is there, then, any other criterion by reference to which these premises can be said to be in the occupation of the Crown? I can find none. The benevolent persons who maintain this institution are the persons by whom the expenses are ultimately payable, although they may receive contributions towards such expenses; and the property of the institution is not the property of the Crown. I can find no principle on which these premises can be said to be in the occupation of the Crown. I have only one further observation to make. The case of *Sheppard* v. *Bradford* (1) was cited as an authority. The school there was substantially similar to that now in question. The decision in that case turned mainly on the view that the school was either a charitable institution or an institution for public purposes, which at that time was supposed to be a sufficient ground for exemption, though no doubt Byles, J., did to some extent proceed upon the exemption of the Crown from rates. I do not think that decision can be considered as an authority since the *Mersey Docks Case.* (2) We are bound, I think, to take the rule laid down in that case, and to inquire whether these premises are occupied by the Crown; and our answer to the question must, as it appears to me, be in the negative.

LOPES, L.J. I think we must hold these premises to be rateable. Before the *Mersey Docks Case* (2) it was considered that any building used solely for charitable or public purposes was exempt from rateability. The *Mersey Docks Case* (2) put a construction on the Act of Elizabeth inconsistent with that idea. That being a decision of the House of Lords must be taken now to be the governing case on the subject. The only principle of exemption laid down in that case is that the Crown not being named in the statute is not bound by it, and therefore lands and houses occupied by the Crown or its servants, which comes to the same thing, are not liable to be rated. The ground of this non-liability is put by Lord Cairns in *Greig* v. *University of Edinburgh* (3) very

(1) 16 C. B. (N.S.) 369. (2) 11 H. L. C. 443.
(3) Law Rep. 1 Sc. App. 348, at p. 350.

clearly and succinctly. He says: "The general principle, as I understand it, approved of by your Lordships in this case is this, that, the Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor." The question, therefore, comes to this: can this reformatory school be said to be in the occupation of the Crown? It is not occupied by any persons over whom the Crown has such control as to render their relation to the Crown that of servants. The school was originally created by private effort. The site and building belong to private persons. It is largely supported out of private resources. The officers in charge of the school are appointed and dismissed by the managers. The managers may take or refuse any child sent to them. They can discontinue the establishment by giving six months' notice without the consent of the Crown. It does not seem to me necessary to express any opinion on the question whether this building is a prison or not. It seems to me rather in the nature of a private institution, but in any case it is not in the occupation of the Crown. I am unable to distinguish it in principle from the case of an industrial school, which was held in *Reg.* v. *West Derby* (1) to be rateable, or that of a private lunatic asylum to which the Lord Chancellor has power to send lunatics. With regard to the case of *Sheppard* v. *Bradford* (2) it appears to me only necessary to say that, having been decided before the *Mersey Docks Case* (3), it cannot now be considered an authority. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Gregory, Rowcliffes, & Co., for Threlfall.*

Solicitors for respondents: *Bower, Cotton, & Bower, for Parr Sadler, & Dickinson.*

E. L.

(1) Law Rep. 10 Q. B. 283. (2) 16 C. B. (N.S.) 369.
(3) 11 H. L. C. 443.

1888
Feb. 10, 22.

THE MARQUIS OF ABERGAVENNY *v.* THE BISHOP OF LLANDAFF.

Ecclesiastical Law—Bishop—Welsh Diocese—Clergyman ignorant of Welsh Language—Refusal to institute—Discretion—"If he shall think fit"—"Due Examination and Inquiry"—1 & 2 *Vict. c.* 106, *s.* 104.

By 1 & 2 Vict. c. 106, s. 104, within certain dioceses "it shall and may be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who, after due examination and inquiry, shall be found unable to preach, administer the sacraments, perform other pastoral duties, and converse, in the Welsh language."

The patron of a benefice in one of such dioceses presented a clergyman who could not speak Welsh. The bishop thereupon commissioned certain persons to hold an inquiry as to whether the parish required a pastor who should know Welsh. The persons so commissioned held the inquiry and reported to the bishop, but refused to permit the patron or the clergyman to be present or to be represented or produce evidence at the inquiry. The bishop, on receiving the report, refused to admit or institute the clergyman.

In an action by the patron against the bishop in respect of such refusal:—

Held, that "due examination and inquiry" meant examination and inquiry as to the clergyman's knowledge of the Welsh language, not as to the requirements of the parish, that the statute gave an absolute discretion to the bishop as to the mode of ascertaining the requirements of the parish, that he was not bound to hold a formal inquiry of a judicial character for that purpose, and therefore the refusal to hear the patron or the clergyman did not invalidate the inquiry which was held, and the bishop was justified in refusing to admit or institute the clergyman.

Action by the patron of the rectory of Goytre, in the county of Monmouth, in the diocese of Llandaff, against the bishop of the diocese, for refusing to admit or institute a clergyman whom the plaintiff had presented to the rectory.

Feb. 10. The action was tried before Huddleston, B., without a jury.

The nature of the pleadings, the facts proved, and the arguments, are stated, and the clause in the statute (1 & 2 Vict. c. 106, s. 104), on which the decision turned, is set out, in the judgment.

Sir Henry James, Q.C., Jeune, and *Spofforth*, for the plaintiff.

The Attorney General (Sir Richard E. Webster), Sir Walter Phillimore, B. F. Williams, Q.C., Arthur Lewis, and *Wilfred Baugh Allen*, for the defendant.

Cur. adv. vult.

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Feb. 22. HUDDLESTON, B. This is an action in the nature of a quare impedit.

The statement of claim sets out the plaintiff's title to the advowson of the church rectory and benefice of Goytre, in the county of Monmouth, in the diocese of Llandaff; that on April 16, 1886, that benefice became vacant; that the plaintiff was entitled to present to the Lord Bishop of Llandaff a fit clerk for admission; and that he accordingly, on October 4, 1886, presented to the defendant the Rev. Robert Wilkes Gosse, a fit clerk, and requested the defendant to admit and institute him; and that the defendant, on November 12, 1886, unjustly refused and still refuses to admit or institute the Rev. Robert Wilkes Gosse to the said church rectory and benefice. And the plaintiff claims a declaration that he is entitled to have the Rev. Robert Wilkes Gosse admitted, and a writ directing such admission, damages, costs of the action, and further relief.

In the statement of defence the defendant says that he has not and does not claim to have anything in the said church rectory and benefice except the admission, institution, and induction of parsons to the said church rectory and benefice; that the Rev. Robert Wilkes Gosse was not a fit clerk, wherefore the defendant thought fit to refuse institution; that the Rev. Robert Wilkes Gosse was so unfit by reason of the church rectory and benefice of Goytre being within the diocese of Llandaff; and that the Rev. Robert Wilkes Gosse was and is unable to preach, administer the sacraments, and perform other pastoral duties, and converse, in the Welsh language; and that the Rev. Robert Wilkes Gosse was after examination and inquiry found unable to preach, administer the sacraments, and perform other pastoral duties, and converse, in the Welsh language, whereupon the defendant thought fit to refuse institution to him. It alleged, also, that the defendant refused to admit or institute the Rev. Robert Wilkes Gosse unless and until he should have presented himself for examination in the Welsh language with a view to the defendant's ascertaining whether he should, on such examination, be found able to preach, &c., in the Welsh language, which the Rev. Robert Wilkes Gosse then neglected and declined to do, which is the alleged refusal in the statement of claim mentioned, and, save

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Huddleston, B.

as aforesaid, the defendant did not refuse as in the statement of claim mentioned; that the defendant always has been and still is ready and willing to examine the Rev. Robert Wilkes Gosse or to cause him to be duly examined, with the view aforesaid. And the defendant further says that since the action he offered to examine the Rev. Robert Wilkes Gosse, or cause him to be examined, which offer the Rev. Robert Wilkes Gosse refused to accept.

The plaintiff, in his reply, admits that the rectory and benefice in question of Goytre are in the diocese of Llandaff, but that the same are in England; that after the presentation of the Rev. Robert Wilkes Gosse to the benefice, the defendant, without notice to the plaintiff or to the Rev. Robert Wilkes Gosse, issued a commission to certain persons to inquire into the necessity or otherwise of appointing as incumbent of the parish of Goytre a clergyman who should be conversant with the Welsh language; that on November 2, 1886, the commissioners met for the purpose of such inquiry; that the plaintiff and the Rev. Robert Wilkes Gosse were prepared to shew that few if any people in Goytre were imperfectly or not at all instructed in the English language, and that there was no ground for requiring a knowledge of Welsh in the incumbent for Goytre; and the solicitor for the plaintiff and the Rev. Robert Wilkes Gosse applied to the commissioners to be allowed to be present at the inquiry and to be heard on their behalf, but the commissioners refused to hear the solicitor, or allow him or any person other than the witness under examination and a newspaper reporter to be present at the inquiry. The commissioners further refused to receive the evidence of any witness not then habitually resident in Goytre, and thus excluded several important witnesses whom the plaintiff and the Rev. Robert Wilkes Gosse desired should be examined. That the commissioners on November 11 sent to the defendant a summary of the evidence taken by them and reported; that the defendant, without any further or other inquiry, and without notice to the Rev. Robert Wilkes Gosse or the plaintiff, on November 12 refused to institute the Rev. Robert Wilkes Gosse to the benefice of Goytre unless and until he passed an examination in the Welsh language. The plaintiff admits that the Rev. Robert Wilkes

Gosse refused to be examined in the Welsh language, submits he had a right so to do, and further admits that the Rev. Robert Wilkes Gosse is ignorant of the Welsh language. The plaintiff also submits that the defendant was, before refusing to institute the Rev. Robert Wilkes Gosse, bound himself duly to inquire whether the circumstances were such as to justify a refusal to institute him on the ground of ignorance of the Welsh language; that the defendant was not entitled to delegate such duty to any other persons; that the inquiry of the commissioners was wholly void; that the refusal of the said Rev. Robert Wilkes Gosse was without legal cause; and that, save as aforesaid, the plaintiff denies the allegations in the defence and each and every of them.

The defendant rejoins, alleging that though the church rectory and benefice of Goytre are in England they were in the diocese of Llandaff; he admits that, without notice to the plaintiff or to the Rev. Robert Wilkes Gosse, he issued what was referred to as a commission, and that on November 2 the persons acting thereunder met for the purpose of the inquiry; that the solicitor for the plaintiff and the Rev. Robert Wilkes Gosse applied to the said persons to be allowed to be present at the inquiry; that those persons refused to hear the solicitor, or allow him or any other person other than the witness under examination and a newspaper reporter to be present; that the so-called commission was entirely informal, and was instituted wholly for the purpose of informing the mind of the defendant, and was not properly to be styled a commission: and the defendant never in fact issued any commission. The defendant does not admit that the plaintiff or the Rev. Robert Wilkes Gosse, or either of them, were prepared to shew the matters which it is alleged in the third paragraph of the reply that they were prepared to shew, or any of such matters. That the defendant, though not bound in law so to do, before refusing to institute the Rev. Robert Wilkes Gosse, duly inquired whether and was satisfied that the circumstances were such as to necessitate a refusal to institute him on the ground of ignorance of the Welsh language, and, in fact, many of the inhabitants of Goytre spoke Welsh and understood that language better than English, and divers of them

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Huddleston, B.

were imperfectly or not at all instructed in the English language. He also alleges that after the report of the commissioners, and after the commencement of the action, on March 19, the defendant himself personally held a public inquiry in the parish into the linguistic condition of the parish with a view to satisfy himself, by personal inquiry in the parish, whether it was such as to require that its incumbent should possess a knowledge of the Welsh language. The defendant, after carefully holding the said inquiry and hearing the evidence, was of opinion that the condition of the parish was such as to require that its incumbent should possess a knowledge of the Welsh language, to enable him to preach, administer the sacraments, perform other pastoral duties, and converse, in the Welsh language; that the said last-mentioned inquiry was entirely free from the supposed objections urged against the original inquiry, and the defendant, after holding the same, offered to examine the Rev. Robert Wilkes Gosse or cause him to be examined in the Welsh language, which offer the Rev. Robert Wilkes Gosse refused to accept, whereupon the defendant again refused to institute him. The defendant alleges that by the true construction of 1 & 2 Vict. c. 106, s. 104, the words "after due examination and inquiry" therein contained refer to an examination or inquiry into the linguistic powers of the spiritual person in question, and not into the linguistic condition or requirements of the parish, and consequently the defendant was entitled, if he should think fit, to refuse institution to any benefice within the diocese of Llandaff to any spiritual person found unable to preach, administer the sacraments, perform other pastoral duties, and converse, in the Welsh language, without holding any formal or other inquiry into the linguistic condition of the parish, or as to whether the circumstances were such as to justify a refusal to institute on the ground of ignorance of the Welsh language, and that in any case the defendant was the sole judge in his uncontrolled discretion as to the linguistic requirements of the parish, and was not bound to hold either a public or formal inquiry.

To this the plaintiff surrejoins that the inquiry by the Bishop himself on the 19th of March was invalid, as it was held after the refusal of the defendant to institute the Rev. Robert Wilkes

Gosse; that neither the said Rev. Robert Wilkes Gosse nor the plaintiff was required to attend; and that the time within which the defendant was required by law to accept or refuse the said Rev. Robert Wilkes Gosse had elapsed long before the inquiry.

The points on the pleadings would seem, therefore, to raise the issues as to whether the inquiry before what were called the commissioners and the subsequent inquiry by the Bishop himself were invalid—while it was admitted that the Rev. Robert Wilkes Gosse was not a person conversant with the Welsh language and refused to be examined in that language—the defendant relying upon the construction which he put upon the statute referred to.

The facts proved before me were these. On April 16, 1886, the previous rector of Goytre died, Goytre being in Monmouthshire, but within the diocese of Llandaff. On August 16 the Bishop, in answer to a letter of the Rev. Robert Wilkes Gosse, no doubt informing him of the intention of the plaintiff to appoint him to the living, wrote to Mr. Gosse, saying, "I think it right to inform you that representations have been made to me that a knowledge of Welsh is required by the incumbent of Goytre. I am not at present prepared to say that such a knowledge is requisite, but the matter has been so strongly urged that I think it will be necessary for me to issue a commission to inquire into the lingual condition of the parish before I can undertake to institute a clergyman ignorant of Welsh. In saying this I am assuming that you are unacquainted with the Welsh language. In reply to your inquiry with regard to a house, I desire to say that if there is no suitable house in the parish I shall be prepared to give you a licence of non-residence for the present, provided you are able to procure a house sufficiently near to the church and parish to enable you to discharge your parochial duties efficiently." On October 4 the Rev. Robert Wilkes Gosse was presented by the plaintiff to the benefice of Goytre, and on October 9 he wrote to the Bishop saying that he had inquired in different parts of the parish as to whether there were Welsh-speaking people resident there, and that he had been informed that "all were able to speak English well, and that there were only two or three families on the borders of the parish, near Llanover, who were acquainted with Welsh." On

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Huddleston, B.

October 10 the Bishop replied that, "in consequence of representations made to me it will be my duty to make formal inquiry into the lingual condition of the parish of Goytre, but should it turn out that the state of things is as represented in your letter, I shall have much pleasure in instituting you to the benefice." On October 15 the Bishop wrote to Mr. Lewis, who had been high sheriff for the county, saying that he had resolved to appoint a commission as to whether the parish required a pastor who should possess a knowledge of Welsh, and asking Mr. Lewis to act as a commissioner for that purpose in conjunction with the Archdeacon of Monmouth and Canon Evans, the vicar of Rhymney; and it would seem that those two clergymen were also requested by the Bishop to undertake that inquiry. No notice of the appointment was given either to the Marquis or to Mr. Gosse; but the rumour of the intended appointment seems to have reached Messrs. Gabb & Walford, the plaintiff's solicitors, and on October 23 they wrote, asking to be informed when and where the commission would sit, as both the patron and Mr. Gosse should, of course, be represented. The Bishop's secretary on October 25 referred Messrs. Gabb & Walford to the Archdeacon of Monmouth, as chairman of the commission, and on October 29 Messrs. Gabb & Walford applied to the Archdeacon, as solicitors for the patron, the Marquis of Abergavenny, and as representing the Rev. Robert Wilkes Gosse, proposing, with his concurrence, being present at the inquiry to conduct the case in support of the view of the patron that there was no necessity to appoint as rector a clergyman conversant with the Welsh language, adding "We have before us a copy of the notice affixed to the church door, and observe that you propose to confine the evidence to that which can be given by persons 'habitually' resident in the parish. May we ask you whether the evidence of any persons who have formerly been resident but who have lately removed would be accepted? We make this inquiry in order to avoid the unpleasantness and inconvenience of possibly getting someone to attend whose evidence, after all, might not be accepted." In answer to that, on October 30, the Archdeacon replies that "it will be undesirable to depart from the strict interpretation of the conditions affecting the evidence to be

offered and laid down in the notice of commission—that the decision of the Court of Commissioners will probably if not certainly be against admitting or hearing counsel on either side." On November 2 the Archdeacon, Canon Evans, and Mr. Lewis sat. No summons or notice was given to either the plaintiff or the Rev. Robert Wilkes Gosse. The rumour of the meeting, however, reached Messrs. Gabb & Walford. Mr. Walford attended on behalf of the plaintiff and the Rev. Robert Wilkes Gosse, and applied to be present and to be heard, but was refused by the Archdeacon, who informed him that no person would be allowed to be present except those who were about to give evidence and one newspaper reporter. Mr. Walford had brought with him several witnesses who were conversant with the parish of Goytre, some residents of the parish, and others, though not residents, persons who had served offices in the parish, and were well conversant with its requirements. He applied for permission to call those witnesses, but was refused. The commissioners made their report, and on November 12 the Bishop, after having received the report, sent this extract from it to the Rev. Robert Wilkes Gosse:—"We are of opinion that a knowledge of Welsh will be not only important but necessary if the incumbent is to keep touch with his parishioners as a whole, and we cannot consistently with duty recommend your Lordship to appoint as incumbent a clergyman whose ignorance of Welsh would be an absolute bar to his influence with fifty or sixty of his parishioners, and might easily interfere with his highest usefulness with a much larger number." The Bishop added, "Under these circumstances I regret to say that it will be impossible for me to institute you to the above benefice until you have passed an examination in Welsh by my Welsh examining chaplain." On November 13 the Rev. Robert Wilkes Gosse wrote to the Bishop:—"In reply to your Lordship's letter received this morning, I beg to say that, as the appointment to Goytre was entirely unsought by me, the matter rests between your Lordship and the Marquis of Abergavenny, and I know he is not satisfied with the way in which the commission was conducted. I have forwarded your Lordship's letter to the Marquis and a copy of it to his solicitors. I regret for many reasons the decision of the commissioners." On November 19

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Huddleston, B.

the Bishop wrote to the Marquis of Abergavenny explaining that in consequence of representations made to him he had appointed the commission; that he regretted that the commissioners were unanimously of opinion that a knowledge of Welsh was absolutely necessary in order to enable the incumbent of the parish to minister duly to a considerable section of the parishioners; and that "under these circumstances I have been reluctantly compelled to decline to institute the Rev. Robert Wilkes Gosse. As it is very desirable that the parish should be provided with an incumbent as soon as possible, I trust your Lordship will kindly present as soon as may be convenient another clergyman who is conversant with the Welsh language." On the 23rd the Marquis replies, alleging that the Bishop's refusal to institute Mr. Gosse had been a great surprise to him. "However, such refusal, and if need be, the presentation of another clergyman in the place of Mr. Gosse, shall receive my earliest attention," and asking for a copy of the commissioners' report. On December 13 the Bishop sends to the Marquis of Abergavenny a copy of the report, "Being anxious that you, as patron, should be made acquainted with the grounds upon which I have arrived at the decision communicated in my last letter." In February the Rev. Robert Wilkes Gosse appealed to the Archbishop of Canterbury, and, the appeal being heard on the 17th, the Archbishop, assisted by the Vicar-General, Sir James Parker Deane, declared that he was not in a position to decide upon the appeal, inasmuch as the above-named commissioners refused to admit either the appellant or the patron of the benefice to their inquiry. It should be noticed that the appeal to the Archbishop was solely on the ground that the Bishop had refused to institute the Rev. Robert Wilkes Gosse as he was unable to preach, administer the sacraments, and perform other pastoral duties, and converse, in the Welsh language. On March 9 the Bishop wrote to the Rev. Robert Wilkes Gosse: "Referring to the correspondence that has passed between us, relative to your institution to the living of Goytre, I desire to remind you that you have not yet informed me whether or not it is your intention to undergo an examination in Welsh by my Welsh examining chaplain. I shall therefore esteem it a favour if you will let me know at your earliest

convenience what your intentions are in order that I may fix a day and hour which may be convenient for holding such examination. I hope I need not add that if you are able to satisfy me that you are possessed of a sufficient knowledge of Welsh to enable you to discharge adequately your ministerial duties in the above parish it will be a pleasure to me to institute you to the benefice." To that letter Mr. Gosse sent no reply. On March 19 the Bishop himself held a personal inquiry at Goytre, as stated in the pleadings.

It is obvious, therefore, upon the pleadings and upon the facts, that the question which I have to decide is whether, it being taken as an admitted fact that the Rev. Robert Wilkes Gosse could not speak the Welsh language, and was not in a position to submit to an examination in that language, the proceedings were such as to justify the Bishop in refusing to institute him.

The point set up in the surrejoinder, that the time within which the defendant was required by law to accept him had elapsed, was not put forward or relied upon. In the time of Queen Elizabeth it was decided, in the case of *Albany* v. *The Bishop of St. Asaph* (1), that it was a good ground of refusal by a bishop to institute a clergyman if he could not speak Welsh in a parish where the parishioners did not understand English, for he cannot instruct his flock according to his duty and charge. It was also decided in that case that the patron having six months to present the notice should be given within that time. The point on the notice is more fully reported in Leonard's Reports, p. 31. I mention this, as Sir Henry James in his argument relied upon the question of notice, but that point does not seem to me to be important in the decision at which I have arrived. The defendant there pleaded that the parishioners were "homines Wallici, Wallicam loquentes linguam et non aliam," and that the presentee could not speak or understand the Welsh language. It was argued "that the defect of the Welsh language assigned by the defendant in the presence of the plaintiff is not a sufficient cause of refusal; for notwithstanding that it be convenient that such a presentee have the knowledge of such language, yet, by the law of the land, ignorance of such language, where the party hath

(1) Croke Eliz. 119; Leonard, 31.

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Huddleston, B.

more excellent languages, is not any disability; and therefore we see that many bishops in Wales who have the principal cure of souls are Englishmen; and the Welsh language may easily be learned in a short time by converse with Welshmen; and the statute of 1 Eliz. (1), which establisheth the Book of Common Prayer, ordaineth that the said Book of Common Prayer shall be put in use in all the parish churches in England and Wales without any provision there for the translation of the said book into the Welsh language. But afterwards by a private Act it was done, by which it is enacted that the Bishop of Wales should procure the epistles and gospels to be translated and read in the Welsh language, which matter our presentee might do by a curate well enough. . . . Gawdy, serjeant, contrary, confessed that at common law the defects aforesaid were not any causes of refusal; but now by reason of a private Act, made 5 Eliz. (2), entituled an Act made for the translating of the Bible and of the Divine Service into the Welsh tongue, the same defect is become a good cause of refusal; in which Act the mischief is recited, viz.:—That the inhabitants of Wales did not understand the language of England, therefore it was enacted that the bishops of Wales should procure so many of the Bibles and Books of Common Prayer to be printed in the Welsh language as there are parishes and cathedral churches in Wales, and so upon this statute this imperfection is become a good cause of refusal." . . . Lord Anderson held "that upon the said statute the want of the Welsh language in the presentee is now become a good cause of refusal." He then referred to the matter of the pleading of the private Act, but it was ultimately decided by the whole Court that the ground of refusal was a good one. That case went off upon the question of notice; but it may be, if it had been submitted to a jury, as it should have been (2 Coke's Inst., pp. 631, 632), that two questions might have arisen for their decision, the one as to the linguistic state of the parish requiring a Welsh-speaking parson, and the other as to the knowledge of the presentee of that language, and it may be that the findings upon both those points would be necessary to support the refusal of the bishop, unless the statute I am about to refer to makes a

(1) Cap. 2. (2) Cap. 28.

difference. It has been held ever since that case that the refusal to induct a parson not knowing Welsh to a parish where the Welsh language was necessary has been a good ground of refusal. By 6 & 7 Wm. 4, c. 77, commissioners were appointed who by s. 10 were to lay schemes before the council for carrying out certain recommendations, and by s. 11 (1) the commissioners were to prepare and lay before His Majesty such scheme as should appear to the said commissioners best adapted for preventing the appointment of any clergyman not fully conversant with the Welsh language to any benefice with cure of souls in Wales in any parish the majority of the inhabitants of which do not understand the English language. This clearly shews the intention of the legislature in accordance with the decision of *Albany* v. *The Bishop of St. Asaph.* (2)

The 1 & 2 Vict. c. 106 is the statute upon which the Bishop relies. By the 103rd section of that Act it is recited that "Whereas in many benefices in Wales and in the counties adjacent thereunto many of the inhabitants are imperfectly or not at all instructed in the English language, and it is expedient that persons to be hereafter instituted or licensed to such benefices should possess an adequate knowledge of the Welsh language." It then recites the statute of the 6 & 7 Wm. 4, c. 77, repeals a portion of that statute, and enacts, by the 104th section, "That within the several dioceses of St. Asaph, Bangor, Llandaff, and St. David's it shall and may be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who, after due examination and enquiry, shall be found unable to preach, administer the sacraments, perform other pastoral duties, and converse, in the Welsh language," with a power of appeal to the Archbishop of Canterbury, and providing also that nothing thereinbefore contained "shall be construed to affect or abridge any rights which the inhabitants of any benefice within the said four Welsh dioceses may at present by law possess of entering a caveat against or objecting in due course of law to the institution, collation, or licence of any spiritual person, or of proceeding to procure the deprivation of any such person." I have to consider

(1) Repealed by 1 & 2 Vict. c. 106, s. 103.
(2) Croke Eliz. 119; Leonard, 31.

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Huddleston, B.

upon this statute what is the meaning of the words "if he shall think fit;" whether, as contended by the plaintiff, they mean that the bishop must institute something in the nature of a judicial inquiry, or whether, as the defendant contends, they mean it to be a matter entirely in his own discretion. If the former, it is said that natural justice requires that he should be heard, or should have an opportunity of presenting his view to the persons deciding, such natural justice as is described in an old law report as having its origin when Adam was not turned out of the Garden of Eden until he had been called upon to shew cause and been heard (1), and the cases of *Capel* v. *Child* (2) and *Ex parte Ramshay* (3) were quoted, to which may be added the case of *Reg.* v. *Smith* (4) and *Rex* v. *Gaskin.* (5) In the first of these cases the question involved a judicial inquiry into the discharge of the ecclesiastical duties of the plaintiff as vicar of the parish, and in the judgments the decision went on the ground that this was a judicial proceeding. So in the case of *Ex parte Ramshay* (3), where the Chancellor of the Duchy had removed a county court judge on the ground of misconduct, where again there was an inquiry in the nature of a judicial proceeding, and so in the case of *Reg.* v. *Smith.* (4) If the plaintiff is right these cases would support his contention, and the objection to the first commission that neither the plaintiff nor the presentee were summoned or allowed to be heard would be a good objection. And the same argument would apply with reference to the inquiry held by the bishop himself on the same grounds, although a more fatal objection to that would be in this suit that it was after action brought. But I read the section as giving an absolute discretion to the bishop which he may exercise without any formal inquiry of a judicial character. Four dioceses are mentioned in the section in which this discretion is to be exercised, and to which it is to be confined. I think the legislature considered that the bishop would or ought to know the wants or requirements of the different parishes within his diocese, or that he could readily obtain such information as would justify him in

(1) *Rex* v. *The Chancellor, Masters, and Scholars of the University of Cambridge* (*Dr. Bentley's Case*), 1 Strange, 557, per Fortescue, J.

(2) 2 C. & J. 558.

(3) 21 L. J. (Q.B.) 238.

(4) 5 Q. B. 614.

(5) 8 T. R. 209.

exercising his discretion: *Reg. on the prosecution of Wray* v. *Governors of Darlington Free Grammar School* (1); *Doe* d. *Childe and Others, Trustees of Ludlow Charities* v. *Willis* (2); *Hayman* v. *Governors of Rugby School.* (3) In the case of *Julius* v. *The Lord Bishop of Oxford* (4) the question was raised under the 3rd section of the Church Discipline Act (5) which provides "that in every case of any clerk in holy orders who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to" certain persons "for the purpose of making inquiry as to the grounds of such charge or report;" and it was held there that that section gave the bishop complete discretion to issue, or decline to issue, such commission; and Lord Cairns, at the end of his judgment, referring to these words, says:—"I ought to mention an argument which was much dwelt upon before your Lordships and in the Courts below, viz., the argument that the words 'if he shall think fit,' in the 3rd section, in the alternative power to the bishop to proceed of his own mere motion, rather imply that, on the application of a third party, he is to proceed, whether he thinks fit or not. My Lords, I do not think that the words 'if he shall think fit' have any such effect. They appear to me to be, where they occur, mere surplusage, as, indeed, is proved by the circumstance that if they were altogether omitted that clause of the section would mean just exactly what it means with those words inserted. But the words, in fact, appear to me to be introduced merely to mark more clearly that an alternative power is conferred upon the bishop, and that he is left free to proceed without any one to put him in motion, if he chooses to do so." (6)

And I think that this was the intention of the legislature in the present case. The 104th section goes on to shew that there

(1) 6 Q. B. 682.
(2) 5 Ex. 894.
(3) Law Rep. 18 Eq. 28.
(4) 5 App. Cas. 214.
(5) 3 & 4 Vict. c. 86.
(6) 5 App. Cas. at pp. 227, 228.

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Huddleston, B.

must be due examination and inquiry upon the question of the knowledge by the presentee of the Welsh language; and, looking at the allocation of the words, it seems to me that the question of the necessity of the parish for a Welsh-speaking parson is a matter entirely in the discretion of the Bishop, but that the linguistic (to use the phrase in the pleadings) knowledge of the parson must be the subject of due examination and inquiry, and that the only appeal given to the Archbishop is as to the knowledge by the parson of Welsh, and that no appeal is given with reference to the requirements of the parish. It is remarkable to see that the former ground is the only one taken in the proceedings on appeal before the Archbishop. The appointment by the Bishop of the commissioners, so-called, may be (as it was) an inquiry to enable him to exercise his own discretion, and not by any means in the nature of a delegation of the authority vested in him, or a judicial inquiry. He might have got his information from any source which he thought reliable, and the fact of having selected three gentlemen whose position could leave no doubt as to the value and integrity of the information they could afford him was, perhaps, more satisfactory to his mind than any other inquiry he might choose to make. With reference to the question as to whether he made due examination and inquiry as to the knowledge of Welsh, it would seem that the allegation to that effect which was in the statement of defence was not substantially denied in the reply; but it is clear beyond all doubt, upon the evidence and upon inquiry, and Mr. Gosse himself admits and confesses on the pleadings, that he is ignorant of the Welsh language, and could not submit to the examination, which the Bishop required him to do in his letter of the 12th of November, and has refused to be so examined.

I have stated the pleadings and facts at some length because I think it right that every circumstance connected with the course which the Bishop has felt it to be his duty to take should be apparent on the face of my judgment. The Bishop had a right to refuse to institute a presentee who was not a fit clerk. The Rev. R. W. Gosse was not a fit clerk, in consequence of his want of knowledge of Welsh, for the parish of Goytre, which the Bishop, in his discretion, found to be a parish requiring a Welsh-speaking

parson. He has, therefore, established the defence set up in the pleadings. I find my verdict for the defendant, and give judgment accordingly with costs.

Judgment for the defendant.

1888

MARQUIS OF ABERGAVENNY v. BISHOP OF LLANDAFF.

Solicitors for plaintiff: *Brooks, Jenkins & Co., for Gabb & Walford, Abergavenny.*

Solicitors for defendant: *Torr, Janeways, Gribble, & Oddie, for R. W. Griffith, Cardiff.*

P. B. H.

Distinguished. THE ARDENNES. [1950] 2 All E.R. 517.

[IN THE COURT OF APPEAL.]

Feb. 11, 13.

LEDUC & CO. *v.* WARD AND OTHERS.

Ship—Bill of Lading—Contract contained in—Evidence to vary Terms of—Deviation—Loss by Perils of the Sea—Bills of Lading Act, 1855 (18 & 19 *Vict. c.* 111), *s.* 1.

The plaintiffs having purchased goods to be shipped from a foreign port on the terms that payment of the price was to be made in exchange for shipping documents, the bill of lading signed upon the shipment of the goods was, upon payment of the price, indorsed to them. The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any ports in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, and was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. In an action brought by the plaintiffs against the shipowners for non-delivery of the goods, evidence was given to shew that the shippers of the goods, at the time when the bill of lading was given, knew that the vessel was intended to proceed viâ Glasgow:—

Held, that such evidence was not admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such voyage; that Glasgow, being altogether out of the course of such voyage, was not such a port; and that the vessel was therefore lost while deviating from the voyage contracted for, and the excepted perils clause did not exonerate the defendants from liability in respect of non-delivery of the goods.

APPEAL by the defendants from the judgment of Denman, J., at the trial without a jury.

The action was by indorsees of bill of lading against shipowners for non-delivery of goods, and the facts were in substance as follows. The plaintiffs had purchased goods from merchants abroad to be shipped from a foreign port. The payment of the

1888

LEDUC v. WARD.

price was to be made in exchange for shipping documents, and, the price of the goods having been paid, the bill of lading, signed by the defendants' captain upon the shipment of the goods, had been indorsed to the plaintiffs. The ship was a general ship. The bill of lading as far as material was as follows: "Shipped in apparent good order and condition on the steamship *Austria*, now lying in the port of Fiume, and bound for Dunkirk, with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property; 3123 bags of rape seed, being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of Dunkirk unto order or assigns." Then followed the usual clause excepting perils of the sea, &c. The vessel, instead of proceeding direct to Dunkirk, sailed for Glasgow and was lost, with her cargo, near Ailsa Craig, off the mouth of the Clyde, by perils of the sea.

Evidence was given at the trial by the defendants, the effect of which was contended to be that the shippers of the goods, who were alleged to be, under the circumstances, the agents of the plaintiffs for shipment of the goods, knew, at the time when the goods were shipped, that the vessel was intended to proceed to Dunkirk viâ Glasgow, and in substance agreed to her so proceeding. (1)

The learned judge admitted the evidence ex majori cautelâ, expressing an opinion, however, that it was not admissible: but he found that it did not prove any agreement on the shippers' part that the ship should proceed viâ Glasgow. He accordingly held that there had been a deviation, and gave judgment for the plaintiffs.

Gainsford Bruce, Q.C., and *Lawson Walton*, (*Finlay, Q.C.*, with them), for the defendants. There was no deviation. The evidence shewed the shippers knew of and agreed to the voyage being viâ Glasgow. This evidence does not really contradict the bill of lading. The bill of lading is a receipt for the goods and imports an undertaking to deliver them at the port of discharge;

(1) It is deemed unnecessary to state in detail the evidence given or the circumstances of the shipment, because the Court held the evidence inadmissible to qualify the bill of lading.

but it does not necessarily contain the terms of the contract as to the voyage or the route by which the ship is to proceed. That may depend on the contract between the parties, which is antecedent to the giving of the bill of lading: see per Lord Bramwell in *Sewell* v. *Burdick*. (1)

[LORD ESHER, M.R. The Bills of Lading Act speaks of the contract contained in the bill of lading.]

The bill of lading is after all only evidence of the agreement, which is really made before it is given, and it is only evidence of it with regard to the terms which it contains. It does not necessarily contain the whole of the terms of the contract of carriage; it is contended that there is no term in this bill of lading providing that the ship shall go direct from Fiume to Dunkirk.

[FRY, L.J. It seems difficult to contend since the Bills of Lading Act that the contract as evidenced by the bill of lading can be contradicted or qualified aliunde. The bill of lading is evidence of a contract which the shipowner issues knowing it may be handed on.]

The indorsee should inquire as to the proposed route. The liberty given to call at any ports in any order is against the notion that the terms of the bill of lading import a contract for a direct voyage. It would be very absurd that the ship should be able to go to Gibraltar and then back again to some port near Fiume, as she undoubtedly might under this clause, and yet could not go out of her way as far as Glasgow. It has been held in America that, although by a bill of lading expressing that goods are to be carried from one port to another, a direct voyage is primâ facie intended, yet that presumption may be controlled by a usage to stop at intermediate ports, or by the personal knowledge on the part of the shippers that such a course is to be pursued: *Lowry* v. *Russell*. (2) It is contended that apart from the parol evidence there was no deviation; the liberty to call at any ports in any order means any port in any ordinary course of voyage from Fiume to Dunkirk.

[FRY, L.J. On the face of the bill of lading no other enterprise is shewn but a voyage from Fiume to Dunkirk. The

(1) 10 App. Cas. 74, at p. 105. (2) 8 Pickering, 360.

1888

LEDUC v. WARD.

contention for the defendants must, it would appear, go the length of saying that the ship may go to any port in the world.]

If it be necessary to go that length, that is the natural meaning of the words.

[They also cited *Crooks* v. *Allan* (1); *Ashley* v. *Pratt.* (2)]

C. Russell, Q.C., and *Gorell Barnes*, for the plaintiffs. It is impossible to separate the contract for carriage from the contract as to the route by which the goods are to be carried. The terms of the Bills of Lading Act distinctly shew that the legislature contemplated that the contract for carriage should be considered as contained in the bill of lading. In this case the property in the goods clearly passed to the plaintiffs by the indorsement of the bill of lading, and it is not open to the defendants to allege as against such indorsees that their liabilities are other than those imported by the bill of lading. The bill of lading has always been held to contain the contract of carriage: see per Lord Selborne in *Glyn, Mills & Co.* v. *East and West India Dock Co.* (3) There are two American authorities which are strongly in the plaintiffs' favour on this point, viz., *The Delaware* (4), and *May* v. *Babcock.* (5) The clause giving liberty to call at any port in any order must be construed as subject to the limitation that they must be ports within the scope of the adventure on which the ship by the terms of the bill of lading is engaged. It cannot be that Glasgow, which, to and fro, would be somewhere about 1200 miles out of the course from Fiume to Dunkirk, is within that liberty.

[They also cited *Davis* v. *Garrett.* (6) They were then stopped by the Court.]

Finlay, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiffs, the owners of goods shipped on board the defendants' ship, sue for non-delivery of the goods at Dunkirk in accordance with the terms of the bill of lading. The defence is that delivery of the goods was prevented by perils of the sea. To that the plaintiffs reply that the goods were not lost by reason of any perils excepted by the bill

(1) 5 Q. B. D. 38.
(2) 16 M. & W. 471.
(4) 14 Wallace, 579.
(5) 4 Ohio, 334.
(6) 6 Bing. 716.
(7) 7 App. Cas. 591, at p. 596.

1888

LEDUC v. WARD.

Lord Esher, M.R.

of lading, because they were lost at a time when the defendants were committing a breach of their contract by deviating from the voyage provided for by the bill of lading. The plaintiffs were clearly indorsees of the bill of lading to whom the property passed by reason of the indorsement; and, therefore, by the Bills of Lading Act, the rights upon the contract contained in the bill of lading passed to them. The question, therefore, arises what the effect of that contract was. It has been suggested that the bill of lading is merely in the nature of a receipt for the goods, and that it contains no contract for anything but the delivery of the goods at the place named therein. It is true that, where there is a charterparty, as between the shipowner and the charterer the bill of lading may be merely in the nature of a receipt for the goods, because all the other terms of the contract of carriage between them are contained in the charterparty; and the bill of lading is merely given as between them to enable the charterer to deal with the goods while in the course of transit; but, where the bill of lading is indorsed over, as between the shipowner and the indorsee the bill of lading must be considered to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods. Where there is no charterparty, as between the grantee of the bill of lading and the shipowner, the bill of lading is no doubt a receipt for the goods, and as such, like any other receipt, it is not conclusive, for it may be controverted by evidence shewing that the goods were not received; the question whether it will be more than a receipt as between the shipper and shipowner depends on whether the captain has received the goods, for he has no authority to make a contract of carriage to bind the shipowner, except in respect of goods received by him. If the goods have not been received, the bill of lading cannot contain the terms of a contract of carriage with respect to them as against the shipowner. But, if the goods have been received by the captain, it is the evidence in writing of what the contract of carriage between the parties is; it may be true that the contract of carriage is made before it is given, because it would generally be made before the goods are sent down to the ship: but when the goods are put on board the

1888

LEDUC v. WARD.

Lord Esher, M.R.

captain has authority to reduce that contract into writing: and then the general doctrine of law is applicable, by which, where the contract has been reduced into a writing which is intended to constitute the contract, parol evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract, except where there is some usage so well established and generally known that it must be taken to be incorporated with the contract. In the case of *Fraser* v. *Telegraph Construction Co.* (1) Blackburn, J., held that a bill of lading must be taken to be the contract under which the goods were shipped. In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2) I expressed the same view that I am now expressing as to the nature of a bill of lading. In *Glyn, Mills & Co.* v. *East and West India Dock Co.* (3) Lord Selborne said, at p. 596, "Every one claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner." The terms of the Bills of Lading Act shew that the legislature looked upon a bill of lading as containing the terms of the contract of carriage.

The next question is whether, assuming the bill of lading to contain the contract of carriage, the particular voyage on which the goods are to be carried is part of the contract so contained. The bill of lading follows the usual form of such documents, and it seems to me clear that such form provides for a particular voyage. If the counsel for the defendants was right in his argument that there is no contract for any particular voyage in the bill of lading, just conceive what a state of things, in a business point of view, would result. The object of the carriage of the goods from port to port is that they may be sold or otherwise dealt with at the place of destination; and the person who wants them at that place for sale or use there acts upon the assumption that they will arrive there at or about a certain time in the

(1) Law Rep. 7 Q. B. 566, at p. 571. (2) 10 Q. B. D. 531.
(3) 7 App. Cas. 591.

1888

LEDUC v. WARD.

Lord Esher, M.R.

ordinary course of a voyage there from the port of shipment. If the argument for the defendants were correct, he could not tell at what time he could calculate on having them. The indorsee of a bill of lading could not tell when he was likely to receive the goods. Business could not be carried on upon those terms. Again, with regard to the insurance of the goods, similar difficulties would arise. How could the goods be insured, if it was not known or what voyage they were to be insured? To suppose that there is no contract for a particular voyage in the bill of lading seems to me to be to disregard the whole course of mercantile business. It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined; and accordingly it seems to me to be provided for in the bill of lading. The ordinary form of bill of lading states that the goods are shipped on such a ship lying in the port of shipment and bound for the port of destination, and if the ship is to go to other places between those ports the names of them are inserted. Those terms appear to me to describe a voyage, and, such being the description of the voyage, what is the true effect of the document with regard to the voyage so described? A bill of lading is a common mercantile document, which has been used for hundreds of years, and I think that business men and Courts of Law have always interpreted it in one way, namely, that, if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other. So here, if the description of the voyage had been merely from Fiume to Dunkirk, I think the contract would have been for a voyage on the ordinary sea track of a voyage from Fiume to Dunkirk, and any departure from that track in the absence of necessity would be a deviation. Of course when I speak of the ordinary sea track I do not mean an exact line, for it would necessarily vary somewhat according to circumstances; the ordinary track for sailing vessels would vary according to the wind; the ordinary track for a steamer, again, might be different from that for a sailing vessel; I mean the ordinary track of such a voyage according to a reasonable construction of the term. In the present case liberty is given to

1888

LEDUC v. WARD.

Lord Esher, M.R.

call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. To "call" at a port is a well-known sea-term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders; it must mean that the vessel may stop at the port of call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their geographical order; and therefore the words "in any order" are frequently added, but in any case it appears to me that the ports must be ports substantially on the course of the voyage. It follows that, when the defendants' ship went off the ordinary track of a voyage from Fiume to Dunkirk to a port not on the course of that voyage, such as Glasgow, there was a deviation, and she was then on a voyage different from that contracted for to which the excepted perils clause did not apply; and therefore the shipowners are responsible for the loss of the goods.

It is said that there is an American case which shews that, although the voyage is described in the bill of lading in terms which on the face of the document can be construed only in one way, the shipowner may be allowed to prove that the person to whom he gave the bill of lading knew that the ship was going on another voyage. If that is the effect of what the Court which decided the case said, it was apparently said in a case where it was not necessary to decide the point, for it seems that there was proof of a custom to deviate which justified the deviation. I cannot help doubting, however, whether what the Court said has

1888

LEDUC v. WARD.

Lord Esher, M.R.

not been misreported. The two other American cases which were referred to seem to me to treat the matter exactly in the same way as it has always been treated in England. So that the weight of the American authorities seems to be against the defendants' contention.

For these reasons I think the appeal must be dismissed.

FRY, L.J. In my opinion many of the points argued are concluded by the provisions of the Bills of Lading Act as applied to the facts of the case. Here the contract made between the merchants abroad and the plaintiffs being that the goods were to be paid for in exchange for shipping documents, the property in the goods passed to the plaintiffs upon the indorsement of the bill of lading. The Bills of Lading Act, 18 & 19 Vict. c. 111, s. 1, says that "every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of the indorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." Here is a plain declaration of the legislature that there is a contract contained in the bill of lading, and that the benefit of it is to pass to the indorsee under such circumstances as exist in the present case. It seems to me impossible therefore now to contend that there is no contract contained in the bill of lading, whatever might have been the case before the statute. The Master of the Rolls has referred to the language used by Blackburn, J., in *Fraser* v. *Telegraph Construction Co.* (1), by himself in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2), and by Lord Selborne in *Glyn, Mills, & Co.* v. *East and West India Dock Co.* (3), as to the contract contained in the bill of lading. The contract of carriage is therefore to be sought for in the bill of lading; and it cannot be doubted that one of the most important terms of that contract is as to the course by which the goods are to be carried to their destination. The question, therefore, becomes simply one of the construction of this contract as to that; and,

(1) Law Rep. 7 Q. B. 566. (2) 10 Q. B. D. 521.
(3) 7 App. Cas. 591.

1888

LEDUC v. WARD.

Fry, L.J.

so far as that is concerned, I entirely agree with the Master of the Rolls. The bill of lading states that the goods are shipped on board the steamship *Austria*, now lying in the port of Fiume and bound for Dunkirk. It further declares that the goods are to be delivered at Dunkirk. As a matter of construction I cannot doubt that the power to deviate from the voyage so described must be confined to that given by the bill of lading in terms, viz., a power to deviate in order to call at any ports in any order, or for the purpose of saving life or property. The question is whether that power includes a power of going to Glasgow, which appears to be, to and fro, somewhere about 1200 miles out of the ordinary course of the voyage. I think the meaning of the clause with regard to calling at ports is what the Master of the Rolls has stated, and that it cannot include a right to go to Glasgow. It is said that there is an American authority which shews that notice to the shipper of the route by which the ship is going to sail will rebut what is said to be an implied term of the contract, viz., that the vessel will proceed by the direct route to the port of destination. In the first place it should be observed that this seems to have been a mere obiter dictum; but assuming that, apart from the Bills of Lading Act, such notice would have had any such effect, which I am far from saying, I think it impossible, having regard to the provisions of that Act, to suppose that any effect could be produced by such notice to the shipper with respect to a contract by bill of lading which is by statute made assignable to a third person; for to hold that it could have such effect would be to hinder that assignability of the contract which the legislature designed to effectuate. The contract as contained in the bill of lading expressly gives certain powers of deviation, and the possibility of the existence of any other power to deviate is according to the ordinary rule governing the construction of written documents thereby repelled. If it were necessary to decide the point, I should be disposed to agree with the learned judge who tried the case, that the evidence given at the trial fell short of proving that there was any understanding between the shippers and the shipowner that the vessel was to go to Glasgow before going to Dunkirk; but I prefer to rest my judgment on the view that the provision of the statute making

the contract contained in the bill of lading assignable is inconsistent with the idea that anything which took place between the shipper and shipowner, not embodied in the bill of lading, could affect the contract. For these reasons I think the appeal should be dismissed.

LOPES, L.J. I only desire to say that the terms of the bill of lading appear to me clear, not only as to the ultimate destination of the goods, but as to the route by which they were to be conveyed to such destination, and that the parol evidence which was given was not in my opinion admissible to contradict the written instrument. The result, therefore, is that the deviation was not justified, and the shipowners are responsible for the goods.

Appeal dismissed.

Solicitors for plaintiffs: *Waltons, Bubb, & Johnson.*
Solicitors for defendants: *Stokes, Saunders, & Stokes.*

E. L.

[IN THE COURT OF APPEAL.]

Feb. 21.

THE MAYOR, ALDERMEN, AND BURGESSES OF BURY *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway Company — Highway carried over Railway by means of Bridge— Repairs of Roadway of Bridge—Obligation of Company—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *s.* 46.

Where a railway crosses a highway, and the road is carried over the railway by means of a bridge in accordance with the provisions of s. 46 of the Railways Clauses Consolidation Act, 1845, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the section the company are to maintain.

APPEAL of defendants from the judgment of the Queen's Bench Division (Mathew and Cave, JJ.) in favour of the plaintiffs upon a special case, the facts of which were in substance as follows:—

The plaintiffs were the urban sanitary authority of the borough of Bury in Lancashire. The defendants were a railway company whose special Acts incorporated the Railways Clauses Consolidation Act, 1845. The defendants had constructed under their special Acts a railway which crossed a turnpike road within the plaintiffs' district. The railway as it approached the road was in a

1888

MAYOR, &c., OF BURY v. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

deep cutting, and was carried under the road, the latter being supported by a bridge of two arches through which the lines passed. The then existing level of the road was not altered by the construction of the railway and bridge by the company. No additional burden or expense was cast upon the plaintiffs or their predecessors in respect of the maintenance and repair of any additional length or width of roadway owing to the construction of the railway, or, in other words, if the line had never been constructed, the plaintiffs, or their predecessors, would have to maintain and repair the identically same length and width of roadway.

The plaintiffs having expended certain sums in the repair of the roadway upon the bridge claimed to be repaid those sums by the defendants. The question for the Court was whether the defendants were liable under the provisions of the 46th section of the Railways Clauses Consolidation Act, 1845, to keep the roadway of the said bridge in repair.

Sir R. E. Webster, A.G., and *Henn Collins, Q.C.* (*W. Graham*, with them), for the defendants. The word "bridge" in the 46th section of the Railways Clauses Consolidation Act does not include the roadway over the bridge. The section speaks of the road as carried over the railway by means of a bridge. The road is spoken of as distinct from the bridge and carried by it. So also the "approaches" in that section mean the wings or outlying parts of the structure of the bridge, either arches or embankments, which carry the roadway up to the bridge, but not the roadway over such approaches. There is good reason why the railway company should be bound to repair the bridge by which the roadway is carried; there is no reason why they should have to repair the roadway, or why the highway authority, which had to repair the roadway before, should be relieved of its liability, no additional burden being cast upon such authority with regard to the roadway. The 46th section must be read in connection with the group of sections (52–58) which contain general provisions as to the obligations of the company in all cases of interference by them with the roadway. It is contended that, having regard to those sections, "bridge" could not have been intended

to include the roadway over the bridge in s. 46. The effect of this construction will be just, because, if the company alter the roadway in a manner that would make its maintenance more burdensome, they will come within those sections; whereas it is unjust that they should have to relieve the highway authority of an obligation really identical with that imposed on them in respect of the road as it existed before the making of the railway. Secondly, the 46th section only contemplates cases where there is an ascent to the bridge, not cases where the road remains on the same level as before. It must be admitted that there are several decisions that are against the defendants' contention, but there are none that are binding upon this Court: *North Staffordshire Ry. Co.* v. *Dale* (1); *Newcastle-under-Lyne Turnpike Roads, Trustees of* v. *North Staffordshire Ry. Co.* (2); *North of England Ry. Co.* v. *Langbaurgh.* (3) In *Waterford and Limerick Ry. Co.* v. *Kearney* (4), *Fosberry* v. *Waterford and Limerick Ry. Co.* (5), and *London and North Western Ry. Co.* v. *Skirton* (6), it was held that where the railway was carried over the highway by a bridge, the roadway being lowered to pass under the bridge, the company were not bound to keep the slopes of the roadway in repair, as being approaches to the bridge under s. 46. There is really no distinction in principle between that and the present case.

R. S. Wright, for the plaintiffs, was stopped. He cited *Great Eastern Ry. Co.* v. *Hackney District Board.* (7)

LORD ESHER, M.R. A great number of judges have on different occasions expressed their opinions that s. 46 of the Railways Clauses Consolidation Act, according to the plain meaning of the words therein used, was to be construed otherwise than as contended for by the defendants. We are now asked to overrule those judges. Speaking for myself, I am not prepared to do so. I think the first decision on the section, which was the decision of Lord Campbell, C.J., and Wightman and Crompton, JJ., in the case of *North Staffordshire Ry. Co.* v. *Dale* (8), really puts the

(1) 8 E. & B. 836; 27 L. J. (M. C.) 147.
(2) 5 H. & N. 160; 29 L. J. (M. C.) 150.
(3) 24 L. T. 544.
(4) 12 Ir. Com. Law, 224.
(5) 13 Ir. Com. Law, 494.
(6) 5 B. & S. 559.
(7) 8 App. Cas. 687, pp. 691, 700.
(8) 8 E. & B. 836.

1888

MAYOR, &c., OF BURY v. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Lord Esher, M.R.

matter on the true grounds. The substance of their view was this: here is a section dealing with certain specified cases in plain language, and, if that section is to be looked at alone, according to the plain meaning of the words, there could not be a doubt as to its effect: but then astute counsel suggested that it must be read in conjunction with other sections, and so endeavoured to bring a fog over its meaning. The Court said that that was not the way to construe it; that, dealing specifically with particular cases, it must be taken by itself. One thing is quite clear, that, whatever works the section compels the railway company to execute, it likewise compels them to maintain for ever. The question is, therefore, what are they bound to execute under the section? The section does not refer to all bridges which they may have to make, but only to certain bridges, which they have to make under certain specified circumstances. It enacts, that "if the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act), either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided: and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company." It was argued for the defendants that the section speaks of the road as carried by the bridge, and that therefore the "roadway" is not included in the term "bridge." That seems to me to be spinning cobwebs and contrary to plain English. According to that argument, when a man is crossing over a bridge, he is not on the bridge but on the roadway under which is the bridge. Then it was argued that the section only applied to cases of bridges where there was an ascent or descent. That is not the meaning. It means that, if there has to be an ascent or descent in the particular case, it must be such as is specified. In ordinary English a bridge includes the roadway upon it over which people are to pass. If the railway company are to make that, as I think they clearly are, they are also to maintain it. With regard to the other sections referred to, they are, as it seems to me, independent

provisions having no relation to s. 46. If they contain general words which might, in the absence of specific provisions, have applied to cases within s. 46, I think, nevertheless, that inasmuch as s. 46 makes specific provisions for those cases, they are excluded from the operation of those general words. I am not prepared to overrule the opinion expressed by so many judges with regard to the effect of this section, but I go further than that: I must say I agree with it. For these reasons I think the decision below was correct and this appeal must be dismissed.

FRY, L.J. I am of the same opinion. It would be very difficult to overrule the long line of decisions which have been pronounced on this section of the Railways Clauses Consolidation Act; but, if the matter were res integra and not affected by authority, I should come to the same conclusion. The words of the section begin by stating the contingency to which its provisions apply. "If the line of railway cross any turnpike road or public highway," then the subsequent provision is to apply. It is argued that the contingency to which it applies is not accurately stated by those words, and that, although the words are general, they only apply to the case where the crossing is such as to involve an ascent or descent, and not to a case where the level of the roadway is unaltered. I think, if we so held, we should introduce a new term into the definition of the contingency to which the section applies. The meaning of the words referring to ascent and descent appears to me merely to be that, if there be an ascent or descent, it shall be as specified. It was argued that "bridge" does not include the road over the bridge; and that the section imposes no liability on the railway company to maintain the roadway. In dealing with this point I start with the observation that, whatever under the section the company are bound to execute, they are also bound to maintain. Therefore the inquiry must be as to what they are bound to execute. It seems to me that in cases to which the section applies, they are bound to make a bridge, and to make a roadway over the bridge as part of the bridge. It appears to me that by the ancient law of England, where a bridge formed part of the highway, the bridge included the roadway over the arches of the bridge. The Statute of Bridges,

1888

MAYOR, &c., OF BURY v. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Fry, L.J.

22 Hen. 8, c. 5, is silent as to the roadway over the bridge, but it is not disputed that the liability under that statute extended to such roadway. Looking to that statute, and especially at the last section, it seems to me obvious that the legislature regarded the obligation to repair the bridge as including the roadway upon it. I have no hesitation in coming to the conclusion that the words "such bridge" in s. 46 mean the bridge with the road on it which is constructed for the purposes of the highway. But the matter does not rest there; the section says, "such bridge with the immediate approaches and all necessary works connected therewith." It was argued that the "approaches" do not include the metalling on the arches or embankments, or whatever may be the sub-structure of the approaches. But surely the approach to a bridge must be something by which the bridge may be approached by the kind of traffic for which the bridge is to be used, and therefore must include the metalling of the roadway. If so, it would be a monstrous conclusion that the company are bound to repair the metalling of the roadway of the approaches but not of the roadway of that to which they are approaches. So, again, the expression "all necessary works connected therewith," must mean works necessary in the same sense as approaches are necessary. Approaches are necessary that vehicular traffic may use the bridge; and so all necessary works mean all works necessary to make the bridge an effective and useful part of the highway. It was said that the provisions of ss. 53 and 56 of the Act affected the construction of s. 46. With regard to those sections, it seems to me enough to say, that they do not apply to cases covered by s. 46, and with reference to cases within that section we must construe the language of the section by itself. For these reasons, I agree that the appeal should be dismissed.

LOPES, L.J. This is a case where a road which is a highway is carried on arches over a railway. In that case s. 46 applies, and its language appears to me to impose on the railway company the burden of perpetually maintaining, not only the fabric of the bridge and approaches, but also the roadway over them. It seems to me idle to say that the term "bridge" does not include the roadway by which the traffic is to pass from one side to the other.

The construction I put upon the section is, in my opinion, the plain meaning of the language, and there is a long current of authority in favour of that construction. It was argued by the defendants' counsel that a different construction ought to be put on s. 46 by reason of the provisions of ss. 53 and 56 of the Act. In my opinion those sections have no application to the case before us. They are wholly independent of s. 46, and not intended to apply to the state of things contemplated by that section. It was further argued that s. 46 only applied where there was a bridge with an ascent or descent to it, but not to a bridge crossing the railway on a level. That suggestion seems to me quite untenable. The road is just as much "carried over the railway" whether it is carried over on a level or by a bridge with an ascent and descent. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *E. Andrew, for S. J. Thorp.*

Solicitors for defendants: *Clarke, Woodcock, & Ryland, for C. Moorhouse.*

E. L.

[IN THE COURT OF APPEAL.]

Feb. 23.

HASLAM FOUNDRY AND ENGINEERING COMPANY, LIMITED, *v.* HALL.

Practice—Patent—Certificate of Validity—Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Patents, Designs and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 31.

By s. 31 of the Patents, Designs and Trade Marks Act, 1883, in an action for infringement of a patent, the Court or a judge may certify that the validity of the patent came in question:—

Held, that such a certificate is not a judgment or order against which an appeal lies to the Court of Appeal under s. 19 of the Judicature Act, 1873.

THIS was an action for the infringement of a patent tried before Stephen, J.

There were a large number of objections to the validity of the patent delivered by the defendant under s. 29 of the Patents, Designs and Trade Marks Act, 1883, and on one of these the

1888

HASLAM FOUNDRY AND ENGINEERING COMPANY v. HALL.

defendant succeeded, and the judgment passed for him. The plaintiffs applied to the learned judge for a certificate under s. 31 of the Act, which enacts that "In an action for infringement of a patent, the Court or a judge may certify that the validity of the patent came in question; and if the Court or a judge so certifies, then in any subsequent action for infringement, the plaintiff in that action on obtaining a final order or judgment in his favour shall have his full costs charges and expenses as between solicitor and client, unless the Court or judge trying the action certifies that he ought not to have the same."

The certificate was granted, and the defendant appealed from this decision.

Feb. 9. *Sir R. E. Webster, A.G.*, (*Aston, Q.C.*, and *Carpmael*, with him), for the plaintiff, objected that there was no appeal against the granting of a certificate. The right of appeal is given by s. 19 of the Judicature Act, 1873, against every judgment or order, and by s. 100 these expressions include a decree and a rule respectively. Such a certificate as that appealed against does not come within any of those terms. It does not affect the present action in any way, but only the question of costs in a future action. If the certificate is wrong that would be a reason for objecting in a future action either to the certificate itself or to its having effect given to it.

Sir H. James, Q.C. (*Moulton, Q.C.*, and *W. R. Bousfield*, with him), for the defendant. This is a proceeding in the action, and if there was no jurisdiction to make it the defendant has a right to object. It certainly may be detrimental to him in his relations with persons whom he has licensed. This certificate can be given by the Court or a judge, and is a matter of discretion. On an appeal against the judgment of the Court below this Court would be entitled to give such a certificate. These considerations shew that it is in effect an order, and so matter of appeal.

Cur. adv. vult.

Feb. 22. LORD ESHER, M.R. I have come to the conclusion that we must yield to the objection raised by the Attorney-

General. The question is whether we can treat the word "certificate" as included in the words "judgment or order." I do not think we can. To do so would carry us too far, considering the great number of certificates which can be given. Under these circumstances it is not necessary to make any observations on the decision of the learned judge. The appeal must be dismissed.

FRY, L.J. I am of the same opinion. The question arises under the 19th section of the Judicature Act, 1873, which gives an appeal in all cases of a judgment or order. By s. 100 the interpretation put on these terms is that judgment is to include decree, and order to include rule. Matters of appeal are, therefore, judgments, decrees, orders, and rules. At the time the Act passed there was another well-known method of expressing judicial decisions, namely, certificates. Of these there are many—certificates for special juries; certificates under the Patent Act; under 3 & 4 Vict. c. 24 that an action is brought to try a right; for counsel on the hearing of a summons; and perhaps many others. If the legislature had intended to give a right of appeal in cases of this sort that intention would have been expressed, but the legislature is silent on the matter. I come, therefore, to the conclusion that "certificate" cannot be included in the words "judgment or order," and that there is no right of appeal.

LOPES, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *J. H. & J. Y. Johnson.*
Solicitors for respondent: *Wilson, Bristows, & Carpmael.*

A. M.

1887
Nov. 2, 8, 9.
1888
Feb. 15.

[IN THE COURT OF APPEAL.]

FINLAY *v.* CHIRNEY AND ANOTHER.

Marriage—Breach of Promise of—Action against Personal Representatives of Promisor—Survival of Cause of Action—"Actio personalis moritur cum personâ"—Special Damage.

An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor.

The special damage which would cause the right of action to survive must be damage to the property, and not to the person, of the promisee, and must be within the contemplation of both parties at the date of the promise, and the action can be brought against the executors for such special damage only, and not for general damages.

APPEAL of defendants from the judgment of the Queen's Bench Division (Field and Wills, JJ.) ordering a new trial.

The defendants were the executors of one G. B. Chirney, and were sued in respect of a breach of promise of marriage committed by their testator during his life. The plaintiff, a widow, was housekeeper to the testator, and was seduced by him under a promise of marriage, a child being born in August, 1884; in April, 1886, Chirney died. At the trial at Newcastle-upon-Tyne before Cave, J., the plaintiff was nonsuited upon the ground that there was no corroboration of the promise, no other point being then taken by the defendants. The plaintiff moved before the Divisional Court to set aside the nonsuit, when the objection was taken on behalf of the defendants that an action for breach of promise of marriage would not lie against the executors of a deceased promisor; but no judgment was given upon this point, the Court being of opinion that the proper course was to send the case down for a new trial. The defendants appealed.

The pleadings contained no allegation that the plaintiff had suffered any special damage by reason of the breach of promise, but the Divisional Court gave leave to the plaintiff to amend the statement of claim in that respect, and to deliver particulars of the special damage to the defendants. By special leave of the Court of Appeal these particulars, verified by an affidavit of the plaintiff, were used during the argument before their Lordships.

1888

FINLAY v. CHIRNEY.

It is unnecessary to set out the particulars at length in this report, they fell under the following heads: (1.) Amount expended by plaintiff in preparation for marriage in the purchase of underclothing and of other material for clothing; (2.) Maintenance of the plaintiff from the date of the promise to the death of the testator; (3.) Costs occasioned by the birth of the child, including costs of its maintenance until the testator's death; (4.) Loss of a parish allowance for each of her three legitimate sons until they attained the age of sixteen, withdrawn before they attained that age in consequence of the birth of the illegitimate child; (5.) Loss, owing to the birth of the child, of a legacy of 100*l.*, which would otherwise have been left to her by her mother in common with her brothers and sisters.

Waddy, Q.C., and *H. F. Boyd*, (*Ernest Pollock*, with them), for the appellants. An action for breach of promise of marriage will not lie against the executors of a deceased promisor; it is a personal action, to which the maxim actio personalis moritur cum personâ is applicable. That maxim applies to all cases of personal wrongs, whether arising ex contractu or ex delicto, and the question whether a cause of action survives or not depends upon whether the resulting damage is purely personal, or whether it is one affecting the real or personal property of the promisee. Even if the action will lie, it can only lie in the event of special damage resulting to the promisee from the breach of contract, and there is none in the present case. There is no English authority directly in point, but in *Chamberlain* v. *Williamson* (1), which was the converse of the present case, it was held that an administrator could not bring an action for a breach of a promise of marriage made to the intestate, if no special damage were alleged. The American Courts have adopted that decision, and have extended its principle to actions brought against the personal representatives of a deceased promisor: *Stebbins* v. *Palmer* (2); *Smith* v. *Sherman* (3); *Hovey* v. *Page* (4); *Lattimore* v. *Simmons*. (5) The cases cited shew that, even if this action will lie upon an averment of special damage, the

(1) 2 M. & S. 408.
(2) 1 Pickering (Mass.) 71.
(3) 4 Cushing (Mass.) 408.
(4) 55 Maine, 142.
(5) 13 Sergeant & Rawle (Penn.) 183.

1888

FINLAY v. CHIRNEY.

special damage which is necessary in order to give the right of action against executors must be something different from the damage ordinarily flowing from the breach of a promise to marry; the expression "special damage" is used not with reference to the promise to marry, but with reference to the estate of the promisee, and there must be damage to the property of the promisee arising from the breach of contract by the promisor.

Digby Seymour, Q.C., and *J. Lawson Walton*, for the respondent. An action for breach of promise of marriage is both in form and in substance an action of contract; it is not different in kind from any other form of action in assumpsit, the difficulty of assessing the damages being the only distinction. The maxim actio personalis is inapplicable to this action; it applies strictly to actions of tort, though it has been extended to actions of debt, because in them the testator could have waged his law: *Pinchon's Case* (1); *Barry* v. *Robinson*. (2) The right of action in fact survived in all cases of contract, but it was necessary to frame an action against executors in assumpsit, for they might have pleaded in abatement to an action of debt or covenant. The limitation of the applicability of the maxim is clearly laid down in *Wheatley* v. *Lane* (3), where it is said that "the maxim never extended to personal actions founded on any obligation, contract, debt, covenant, or any other duty to be performed."

Even if the maxim applies to an action for breach of promise of marriage, it applies so far only as regards the damage to the personal feelings of the plaintiff and the wrong inflicted upon her; the remainder of the damage suffered by her would be free from the limitation imposed by the maxim and would be recoverable as special damage in this action. The only special damage which need be shewn, having regard to the decision in *Chamberlain* v. *Williamson* (4), is pecuniary loss, which is abundantly proved.

Boyd, in reply.

[The following cases were also cited during the arguments; *Raymond* v. *Fitch* (5); *Ricketts* v. *Weaver* (6); *Beckham* v. *Drake* (7);

(1) 9 Rep. 88 a.
(2) 1 New Rep. (Bos. & Pul.) 293.
(3) 1 Wms. Saund. 240.
(4) 2 M. & S. 408.
(5) 2 C. M. & R. 588.
(6) 12 M. & W. 718.
(7) 2 H. L. C. 579.

Alton v. *Midland Ry. Co.* (1); *Hall* v. *Wright* (2); *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (3); *Potter* v. *Metropolitan District Ry. Co.* (4); *Knights* v. *Quarles* (5); *Hambly* v. *Trott* (6); *Phillips* v. *Homfray* (7); *Sollers* v. *Lawrence* (8); *Leggott* v. *Great Northern Ry. Co.* (9); *Pulling* v. *Great Eastern Ry. Co.* (10)]

LORD ESHER, M.R. This was an action brought against the executors of a deceased man in respect of a breach of promise of marriage; it was tried before Cave, J., and evidence as to the facts was gone into, and the only objection raised by the defendants at the trial was, not that such an action would not lie, but that there was no corroboration of the alleged promise. The plaintiff was non-suited, and she then went to the Divisional Court; there, besides the contention as to want of corroboration, the further point was taken by the defendants that the action would not lie; this was decided in favour of the defendants, and upon the case as it was presented to them the Divisional Court might have entered judgment for the defendants, but upon the suggestion that special damage might be laid and proved they granted a new trial, giving leave to the plaintiff to amend by adding allegations of special damage. An appeal is now brought to us, and three questions present themselves for our consideration; first, whether the action will lie without special damage; secondly, whether it will lie with special damage; and thirdly, whether, if special damage be proved, the action will lie only for the amount of such special damage, or whether it will lie for all the damages ordinarily given in actions for breach of promise of marriage; all these three formulas are of great importance.

Upon the first question I entertain no doubt whatever; the authority of English law is overwhelming to the effect that no action for breach of promise of marriage can be brought by executors or will lie against them. The authority for this proposition consists in the fact that in the case of *Chamberlain* v. *Williamson* (11),

(1) 19 C. B. (N.S.) 213.
(2) E. B. & E. 746.
(3) Law Rep. 10 C. P. 189.
(4) 30 L. T. 765; 32 Ibid. 36.
(5) 2 B. & B. 102.
(6) 1 Cowp. 371.
(7) 24 Ch. D. 439.
(8) Willes, 413.
(9) 1 Q. B. D. 599.
(10) 9 Q. B. D. 110.
(11) 2 M. & S. 408.

1888

FINLAY v. CHIRNEY.

Lord Esher, M.R.

it was decided that such an action would not lie, at least at the suit of an administrator, and in the additional fact that there is no case to be found in the books where such an action has been maintained either by executors as plaintiffs or against them as defendants, and this in spite of the fact that circumstances must frequently have arisen which would invite a decision of the question. And besides authority there is the principle expressed in the maxim actio personalis moritur cum personâ. Is an action for breach of promise of marriage a personal action in the sense that the cause of action or complaint or injury is one affecting solely the person both of the promisor and promisee? It is clear that it is not a complaint of anything affecting property, whether personal or real; it is an injury; that is, it is a cause of action purely personal on both sides, personal both to the person to whom and the person by whom the promise is made. It is true that in the old days an action for breach of promise of marriage was in form an action founded on contract, and that even now it is still treated as an action for breach of contract. Formerly an action of tort was almost inevitably a personal action; but it did not follow necessarily that an action was not personal because it was founded on a breach of contract. The complaint in an action for breach of promise of marriage is indeed a complaint of a breach of contract, but the injury is treated as entirely personal, and not only are damages always given in respect of the personal injury to the plaintiff, but also damages arising from and occasioned by the personal conduct of the defendant; and evidence of the conduct of both parties is allowed to be given in mitigation or aggravation. The ages of the respective parties may be taken into account, as well as their whole behaviour; and the damages may be much enlarged if the conduct of the defendant has been an aggravation of the breach of his promise. A consideration of these facts goes to shew that an action for breach of promise of marriage is strictly personal, and that, although in form it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff.

Of course it is said, and said justly, that the damages recovered

in the action affect the property of the respective parties; but that is not the proper test to apply; the true test is whether the cause of action itself is one which affects property. The question is therefore concluded both upon principle and by authority. The same has been held to be the law in America, and all the American cases to which I have been able to obtain access are clear upon the point. I am therefore of opinion that the action as brought, there being no allegation of special damage, was wrongly brought, and that judgment was properly given, though upon a wrong ground, for the defendants at the trial.

But in the only English case on the subject, that of *Chamberlain* v. *Williamson* (1), there is an exception suggested to this rule which is expressed in the words "except there be special damage," and on looking at the American cases I find that they say the same thing. I know, however, of no case in which special damage has been laid and the action has been maintained, and there is no authority to enable us to decide how such a case should be dealt with. Indeed I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length. I can hardly conceive of a case where such special damage could arise as would support the action; but, assuming there were such damage, is its existence to open the whole case against the executors and make them liable, not only for the special damage resulting from the breach by their testator, but for all the damages which could be recovered in such an action against a living person? Does the action against the executors become an action for breach of promise of marriage with all the ordinary consequences of such an action because of the existence of special damage to the plaintiff, or does it lie only for the amount of the special damage? If we were to say that in such a case the whole matter was open for consideration, we should in effect be doing away with the principle that a personal action dies with the person affected by it, and that by reason of the personal nature of the cause of action the executors are not liable; we should have to say that they would be liable in an action for personal injury, which is nothing but a personal action, and this

(1) 2 M. & S. 408.

1888

FINLAY v. CHIRNEY.

Lord Esher, M.R.

would break both the rule and the principle. I entertain no doubt whatever that, even if the action will lie upon proof of special damage, it must be confined to a claim for the special damage only, and that a claim for general damages, which would be recoverable from the defendant in his lifetime, must be struck out. Therefore the damage to be considered must be a damage affecting the property of the plaintiff, and for that only can the action be brought.

What is the kind of special damage that can exist under such circumstances? I think it can only exist in cases where the plaintiff can shew that, besides the promise to marry, there was at the time of the making of the contract another promise affecting the personal property of the one party or the other. Such a promise, if made and proved, would be one of the considerations, or part of the consideration, for the promise of the other party, and there would be one promise moving upon two considerations or upon one complicated consideration. If such an express promise could be proved, it might be sued upon as part of the consideration for the plaintiff's promise; and even though there were no such express promise, yet if circumstances were proved to exist shewing that both the parties contemplated that a breach must affect the property of one or the other, an action might be brought; that is to say, if the case were within the rule laid down in *Hadley* v. *Baxendale* (1), an action would lie in respect of a damage to property or a loss of money through the breach.

I think, therefore, that this action will not lie without special damage, and that if special damage be proved it will not lie for anything that is not special damage. If there be special damage an action will lie for it, and the cause of action will still be for breach of promise of marriage, but the action will lie only for that special damage, whether the damage arises by reason of an express promise which was part of the contract to marry, or whether circumstances existed at the time of the contract which shew that such special damage was then within the contemplation of the parties; and it seems that the American cases point to a like state of the law in that country.

The plaintiff therefore was rightly nonsuited at the trial,

(1) 9 Ex. 341.

although upon a wrong ground; she had then upon the pleadings no cause of action, but the Divisional Court granted her the indulgence of a new trial, and gave her leave to amend her statement of claim by inserting an allegation of special damage. In mercy to both the suitors we have thought it right to look carefully into that question, and we gave leave to the plaintiff to say what was the special damage alleged, and particulars have been delivered to us. In my opinion they disclose nothing that can be called special damage within the meaning of the rule that I have enunciated. It is suggested that the plaintiff had bought her trousseau, but it cannot be said that in all cases of a contract of marriage the lady is justified in at once providing herself with clothes in anticipation of the fulfilment of the contract; in the present case, the plaintiff being in the position of a housekeeper to a farmer, it scarcely seems a reasonable thing to have done. Even in higher ranks of life the same remark would apply; the man who is going to be married has nothing to do with the bride's trousseau, which is provided by her father; if a breach of the promise is committed, the lady still has the clothes, and I cannot think this a good specimen of special damage; besides, such a fact has always been allowed to be given in evidence as an aggravating circumstance, and it is in my opinion not special damage. Then it is also said by the plaintiff that she had given up a better place, and if at the time of the contract to marry the plaintiff had agreed to give it up at once or before the wedding-day, it might be special damage, as being part of the consideration for the promise to marry; but it must be brought to the knowledge of the other party at the time of the contract in order to bring it within the principle in *Hadley* v. *Baxendale* (1); if the agreement to give up the place were made after the contract to marry it would be no part of the promise.

There is one other point which remains to be noticed. It is said that the promise to marry was made as part of an invitation to seduction, and that a child was subsequently born. That would, indeed, be a matter existing at the time of the contract and forming part of the negotiations between the parties, but it would not be special damage, for such a contract would be

(1) 9 Ex. 341.

1888

FINLAY v. CHIRNEY.

Lord Esher, M.R.

contrary to public policy, morality and decency, and such a claim could never be allowed. The special damage recoverable in such an action as this must, as I have said, be something affecting the money value of the contract to the plaintiff, and there is no such class of special damage in the particulars. If the whole of these particulars were inserted in the statement of claim, the same result ought to follow; there would be no case for the plaintiff, and the defendants ought to have judgment. I think, therefore, that we ought to go beyond the Divisional Court, and say that there shall be no new trial and that judgment shall be entered for the defendants. The defendants should have the costs of the trial, and there should be no costs to either side in the Divisional Court or before us.

BOWEN, L.J. The judgment which I am about to read is that of my brother Fry and myself.

That there was in this case some evidence which, if the jury believed it, would be in corroboration of the plaintiff's own story, we do not doubt, for the reasons indicated during the course of the argument. But a more serious question has been raised as to the liability of an executor in respect of an alleged breach of promise of marriage by the testator whose estate he represents.

The liability of an executor in respect of the acts and defaults of his testator has been in the English law a matter of slow growth. The maxim "actio personalis moritur cum personâ" is one of some antiquity, but its origin is obscure and post-classical. Unless indeed some very restricted sense is affixed to the word "personalis," it is by no means true at the present day that a personal action always dies with the person. Upon the other hand, if the meaning of the maxim is to be limited, it is difficult to reconcile its phraseology with the ordinary classifications of ancient English law. Judges and text-writers since the reign of Queen Elizabeth have been in the habit of explaining upon fit occasions that only actions ex delicto were within the operation of the principle. "The rule," says the learned editor of Williams' Saunders (1), "was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant or

(1) 1 Wms. Saund. 240.

any other duty to be performed." This remark is true, if confined to the law of recent times, but it is inexact, if it be taken as applying to the older English law under which actions based upon an obligation as a rule died with the person. As applied, however, to modern times the proposition is supported by abundance of authority. "Actio personalis," says Willes, C.J., in *Sollers* v. *Lawrence* (1), "is always understood of a tort," and similar expressions occur elsewhere in plenty. But though this gloss or limitation has been forced upon the Latin maxim in later times by the exigencies of a growing society, we are left still in the dark as to the maxim's exact meaning or source. The truth is, that in the earliest times of English law survival of causes of action was the rare exception, non-survival was the rule. Moreover, the clear line which we are accustomed at this day to draw between contract and tort in the classification of personal actions does not correspond with the early English law, nor with the history of old English writs and causes of action. Actions of trespass were formerly actions of a quasi-penal character and based upon the supposition of personal wrong. It was not unnatural that such actions should die upon the death of the trespasser. "All private criminal injuries or wrongs as well as all public crimes are buried," says Lord Mansfield in *Hambly* v. *Trott* (2), "with the offender." But survival was also denied to other actions which did not fall within this category. In Bracton's time the general law was that an obligation was got rid of by the death of either of the contracting parties (3). "Item tollitur morte alterius contrahentium, vel utriusque, maximè si fuerit pœnalis, vel simplex—si autem duplex, scilicet pœnalis et rei persecutoria, in hoc quod pœnalis est tollitur, et non extenditur contra hæredes, nec datur hæredibus, quia pœna tenet suos auctores, et extinguitur cum personâ." In debt the executor could not be sued where the testator could have waged his law, see *Pinchon's Case* (4); a condition of things which continued even down to 1805: *Barry* v. *Robinson* (5). And when we consider that all actions on the case (as is said by Blackstone, J., in *Mast*

(1) Willes, 413, at p. 421.
(2) 1 Cowp. 375.
(3) Bracton, fol. 101.
(4) 9 Rep. 88 a.
(5) 1 New Rep. (B. & P.) 293.

1888

FINLAY v. CHIRNEY.

Bowen, L.J.

v. *Goodson* (1), decided in 13 Geo. 3), were originally for torts, and that it was only in the time of Queen Elizabeth that the familiar action of assumpsit was after a controversy introduced, it becomes plain that it is within the last three centuries that the contractual liabilities of an executor have expanded to their present limits.

Modern jurisprudence has, however, since the reign of Queen Elizabeth adopted a rough but convenient interpretation of the maxim, which is set forth in the passage above cited from Williams' Saunders (2). On the one side of the line of demarcation lie actions of tort. Remedies for wrongful acts, according to the present law, can only be pursued against the estate of a deceased person when property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys; *Phillips* v. *Homfray* (3). On the other side of the line lie actions founded on any contract express or implied "or any other duty to be performed." Early in the reign of James an action was allowed against executors for payment of a debt, if clothed in the form of an action on the case in assumpsit: *Pinchon's Case* (4); and this remedial view of the law has been adopted and followed ever since.

The question we have to decide to-day relates to a class of action which, though in its form and substance contractual, differs from other forms of actions ex contractu in permitting damages to be given as for a wrong. This double aspect of an action for breach of promise creates the perplexity in the present instance. On which side of the line is to fall an action which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner? How far is such an action within, how far without, the maxim "Actio personalis moritur cum personâ?" The problem is one which in the nature of things is of later date than the Year Books. Before the Reformation no action for breach of promise could be maintained, for

(1) 2 W. Bl. 848, at p. 850.
(2) 1 Wms. Saund. 240.
(3) 24 Ch. D. 439, at p. 454.
(4) 9 Rep. 89 b.

marriage was a matter of spiritual jurisdiction. It was not till the middle of the seventeenth century that marriage was recognised by our law as a temporal benefit, and a breach of promise of marriage as cognizable by the temporal Courts: *Baker* v. *Smith* (1); see also Rolle's Abridgement (2): *Hebden* v. *Rutter* (3); and *Harrison* v. *Cage* (4), a case supposed erroneously by Willes, J., in *Smith* v. *Woodfine* (5), to be the earliest recorded case of an action for breach of promise of marriage. No authorities of a very early date can accordingly be expected to throw light upon the question, and it must be solved mainly upon principle.

It is a striking and not an immaterial fact that no action for breach of promise of marriage against the executors of a deceased person is to be found in the books. We have, moreover, a case decided by Lord Ellenborough and the Court of King's Bench towards the beginning of the century which affords us some guidance in the matter. In *Chamberlain* v. *Williamson* (6) the converse of the present case occurred in an action brought by the representative of a deceased against a living person for breach of promise. It was held that an action of the sort, in which no special damage was alleged, would not lie, on the ground that except when such special damage had been occasioned the action was in reality an action arising out of a personal injury. "The general rule of law," says Lord Ellenborough (7), "is actio personalis moritur cum personâ, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." This judgment has been adopted as a guiding one by the American Courts in the cases of *Stebbins* v. *Palmer* (8), *Lattimore* v. *Simmons* (9), *Smith* v. *Sherman* (10), and *Hovey* v. *Page* (11). It does not, indeed, follow

(1) Styles, 295.
(2) Tit. Action on the Case, fol. 22, par. 20.
(3) Sid. 180.
(4) Carthew, 467.
(5) 1 C. B. (N.S.) 660; see p. 667.
(6) 2 M. & S. 408.
(7) 2 M. & S. at p. 415.
(8) 1 Pickering (Mass.) 71.
(9) 13 Sergeant & Rawle (Penn.) 183.
(10) 4 Cushing (Mass.) 408, at p. 413.
(11) 55 Maine, 142.

1888

FINLAY v. CHIRNEY.

Bowen, L.J.

that the same reasoning applies in toto to actions brought against the executors of a deceased person: see per Bramwell, L.J., in *Twycross* v. *Grant*. (1)

But the decision in *Chamberlain* v. *Williamson* (2) shews, at all events, that the Courts of this country will, even although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim "actio personalis" to so much of the damages as are a remedy for mere personal wrong, and will allow so much of the remedy to survive as seems to belong to the ordinary category of actions ex contractu. In order accurately to draw the dividing line, it becomes necessary to analyse the damages which are recoverable in cases of breach of promise, and their measure and character has nowhere been better explained than in Sedgwick on Damages, vol. ii., p. 146, in a passage cited with approval by Willes, J., in *Smith* v. *Woodfine*. (3) "This action," says the learned author, "is given as an indemnity to the injured party for the loss she has sustained, and has been always held to embrace the injury to the feelings, affections and wounded pride, as well as the loss of marriage. From the nature of the case it has been found impossible to fix the amount of compensation by any precise rule, and, as in tort, the measure of damages is a question for the sound discretion of the jury in each particular instance, subject, of course, to the general restriction that a verdict influenced by prejudice, passion or corruption will not be allowed to stand. Beyond this the power of the Court is limited, as in cases of tort, almost exclusively to questions arising on the admissibility of evidence when offered by way of enhancing or mitigating damages." It is, as it seems to us, by way of enhancing damages, and not as a special head of damage flowing naturally from the breach, that evidence of the means of the defendant is usually given at the trial. If it were otherwise, such head of damage would require special averment on the record. But it is treated as part of the history of the circumstances of the case, and as enabling the jury to estimate properly the conduct of the defendant. "The value of the defendant's property," says Cresswell, J., in *Smith* v. *Woodfine* (4),

(1) 4 C. P. D. 40.
(2) 2 M. & S. 408.
(3) 1 C. B. (N.S.) 660, at p. 667.
(4) 1 C. B. (N.S.) at p. 666.

"is invariably gone into in cases of this sort." But where there is no special averment on the record of pecuniary loss arising out of the breach, the general allegation of the breach of promise imports, according to Lord Ellenborough, only a personal injury: *Chamberlain* v. *Williamson* (1); though the jury may consider such personal injury with reference to all the circumstances of the case.

There may, of course, be an actual loss to the temporal estate of the promisee, arising out of the breach of contract. If such loss is to be relied on as independent and special damage in an action against executors, it ought to be specially pleaded, and in order to see if such damage is in fact recoverable the ordinary line as to remoteness of damages will have to be drawn according to the well-known doctrine of *Hadley* v. *Baxendale*. (2)

If the above is a correct account of the damages recoverable in an action for breach of promise it would seem to follow that with the death of the promisor all claim to damages of an exemplary or sentimental kind ought to cease, and that such damages only ought to be left as represent compensation for a temporal and measurable loss flowing directly from the breach or within the contemplation of both parties at the date of the promise, and that in an action against executors such a temporal loss, if it is alleged, must be tested according to the ordinary rules as to remoteness as applied to the special facts of the case. In the present action there is no special averment of temporal loss, and we ought not to allow the pleadings at this late stage to be amended and to send down the case to trial again, unless we are satisfied that there is a substantial claim under this head fit for the consideration of the jury. By special leave of the Court the plaintiff has now filed an affidavit as to particulars of special damage. The only items which are entitled even to plausible consideration are two: first, the expense to which the plaintiff was put in maintaining herself as a feme sole subsequently to the breach; and, secondly, the amount expended by the plaintiff in the purchase of underclothing, &c., in preparation for her marriage. The plaintiff's expense in maintaining herself after she was forsaken clearly cannot be recovered. It cannot be a

(1) 2 M. & S. 408.

(2) 9 Ex. 341.

1888

FINLAY v. CHIRNEY. Bowen, L.J.

consequence naturally arising out of a breach of promise of marriage that the woman is to be entitled during the remainder of her life to charge the expenses of her living and maintenance to her faithless lover. With respect to the claim for underclothing, &c., it is sufficient to say that the materials furnished by the plaintiff's affidavit do not shew that such purchase was made under circumstances which would bring the expenditure within the head of damages flowing directly from the alleged breach of contract or within the contemplation of the parties at the time. We do not desire to intimate any opinion that expenditure in respect of a marriage trousseau or other marriage preparation must necessarily be too remote to be recovered against executors in an action for breach of promise of marriage—the matter must in each case depend upon the circumstances of the case—but though invited to do so, the plaintiff has not given us the means of seeing that this particular head of damage can be sustained by evidence, or what case she has for asking for an amendment to be made in the statement of claim which would include it. The action, therefore, must be dismissed with costs; but as the only point taken by the defendants at the trial was one as to corroboration, and as that point was a bad one, we think that there ought to be no costs of the hearing of the Divisional Court or of this appeal.

Judgment for the defendants.

Solicitors for plaintiff: *Harvey & Capron, for Nicholson, Morpeth.*

Solicitors for defendants: *Crossmans & Prichard, for G. & F. Brumell, Morpeth.*

W. J. B.

[IN THE COURT OF APPEAL.]

1888
Feb. 3.

IN RE HENDERSON. EX PARTE HENDERSON.

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Order for Payment of Alimony pendente lite—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 52.

An order for the payment of alimony pendente lite is not a "final judgment" against the husband within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued against the husband in respect of arrears due under such an order.

Ex parte Moore (14 Q. B. D. 627) distinguished.

APPEAL against the refusal to make a receiving order against the respondent, W. R. Henderson.

It appeared that the wife of the respondent had presented a petition to the Divorce Division for a judicial separation, on the ground of his desertion. On June 9, 1887, the President made an order that the respondent should pay to the wife alimony pending suit at and after the rate of 120*l.* per annum, to commence from the date of the service of the citation, and to be payable monthly.

The respondent did not obey the order, and on October 7, 1887, five monthly payments of 10*l.* being unpaid, the wife served a bankruptcy notice on him. He did not comply with the notice within the time limited for his so doing, and the wife presented a bankruptcy petition against him. The Registrar refused to make a receiving order, on the ground that the order for payment of alimony was not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883. The wife appealed.

Sidney Woolf, for the appellant. The petition for alimony is an independent proceeding, and the order for payment of alimony is a final order in that proceeding. Orders of the Divorce Division can be enforced in the same way as a judgment of the Chancery Division: 20 & 21 Vict. c. 85, s. 52. An order for the payment of costs has been held to be a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883: *Ex parte Moore*. (1)

(1) 14 Q. B. D. 627.

1888

IN RE HENDERSON. EX PARTE HENDERSON.

[FRY, L.J. In *Linton* v. *Linton* (1) it was held that future payments of alimony under an order of the Divorce Court could not be proved as a "debt or liability" in the bankruptcy of the husband.]

It is sufficient that the order can be enforced in the same way as a judgment. An action could not have been brought upon the order for payment of costs in *Ex parte Moore*. (2) The Court has never altered the amount of the arrears payable under such an order; and as regards the arrears the order is final. Arrears of alimony can be proved for in the husband's bankruptcy: *Dickens* v. *Dickens* (3); *Prescott* v. *Prescott* (4). In *Linton* v. *Linton* (1) the alimony was permanent, and the decision was only that future payments could not be proved in the bankruptcy.

Muir Mackenzie, for the respondent, was not heard.

LORD ESHER, M.R. This appeal must be dismissed. The question is whether this order for alimony can be considered a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, assuming that it is a "judgment" at all. It seems to me that the question whether a judgment or order is final or not must be determined upon a view of it at the time at which it is made. If it is not "final" at that time, it cannot be made so by reason of its not being obeyed, or by any other circumstances which have arisen since that time. I say that in order to meet the argument that, because the husband against whom the order was made has allowed arrears of the alimony to accumulate, his disobedience has made the order a final one as regards the arrears, if it was not final at the time at which it was made. Assuming that, if this order were final, it would be a "final judgment," can it be said that such an order is a final order? I do not think that such a proposition can be maintained. It is an order to pay alimony pendente lite, and according to the practice of the Divorce Court such an order can be varied at any time so long as the lis is pending. It is as much an interlocutory order as any order made by any Court could well be. Can it be said that an order to pay, which forms part of an interlocutory

(1) 15 Q. B. D. 239.
(2) 14 Q. B. D. 627.
(3) 31 L. J. (P. & M.) 183.
(4) 20 L. T. (N.S.), 331.

order, is itself a "final" order? It is argued that *Ex parte Moore* (1) is an authority to that effect. But that case only decided that an order for the payment of costs which formed part of a final judgment could itself be treated as a final order or judgment. The order to pay the 10*l.* per month does not form part of a "final judgment," and therefore, on this ground, I am sorry to say that we must affirm the Registrar's decision, and dismiss the appeal.

FRY, L.J. I am of the same opinion. In the first place, the order upon which the appellant relies is not a "judgment" at all; it has none of those characteristics which lawyers know are to be found in a "judgment." It is a simple "order," as contrasted with a "judgment," and we are not at liberty to alter the words of the Act. In the next place, it is not a "final" order. I cannot conceive of any order made by any Court less final in its nature. It is an order pendente lite, and it is subject to revision by the Court week by week and month by month. The Court may at any time, until the lis is at an end, direct that no alimony at all shall be paid, or may increase or diminish the amount. There is, therefore, no pretence for saying that the order is "final," or that it is a judgment. The argument was rested mainly upon *Ex parte Moore* (1), but it was founded upon a total misapprehension of what that case decided. In that case there was a final judgment which determined, not merely a subordinate issue, but the matter which was in contest in the action. That judgment directed an inquiry as to damages, and it was contended that the fact that the inquiry was directed prevented the remainder of the judgment from being "final." The answer to the argument was this, It is a judgment which finally determines the rights of the parties with regard to the main contest in the action, and its "final" nature is not altered by its directing an inquiry which would not be followed by any further judgment of the Court.

LOPES, L.J. In my opinion a bankruptcy notice cannot be founded upon any "order," however "final" it may be, unless it

(1) 14 Q. B. D. 627.

1888

IN RE HENDERSON. EX PARTE HENDERSON.

Lopes, L.J.

forms part of a "final judgment" upon the matter in contest in the action. I have no doubt that that is the effect of the decision in *Ex parte Moore*. (1) In the present case the order is made pendente lite: it may be varied at any time, the amount of the alimony may be increased or diminished; and the order, if it is not altered, determines with the lis. In my opinion such an order is essentially interlocutory, and cannot in any sense of the words be said to be a "final judgment." The section must be construed according to the ordinary and strict meaning of the words.

Appeal dismissed.

Solicitors for wife: *Lewis & Lewis.*

Solicitors for husband: *Tyrrell Lewis & Co.*

W. L. C.

Feb. 17.

[IN THE COURT OF APPEAL.]

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

Bankruptcy—Bankruptcy Notice—Act of Bankruptcy—"Final Judgment"—Order for Dismissal of Action for want of Prosecution—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

In an action in the Chancery Division the defendant obtained under Order XXVII., r. 1, an order for the dismissal of the action for want of prosecution, and the payment of costs by the plaintiff:—

Held, affirming the judgment of the Queen's Bench Division, that the order was not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and that the defendant was not entitled to serve the plaintiff with a bankruptcy notice in respect of such order.

APPEAL against a decision (ante, p. 318) of a Divisional Court (Cave and Grantham, JJ.) affirming an order of the County Court at Newcastle-on-Tyne, dismissing a bankruptcy petition presented against Edward Riddell, on the ground that no act of bankruptcy had been committed.

The respondent had brought an action against the appellant to recover possession of land; for a declaration of his title to the land; and for mesne profits; and North, J., had made an order in chambers dismissing the action for want of prosecution, with costs. The costs having been taxed at 52*l.*, the appellant served the respondent with a bankruptcy notice for the taxed amount,

(1) 14 Q. B. D. 627.

1888

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

and the failure of the respondent to comply with that notice was the act of bankruptcy alleged in the petition. The registrar of the county court held that the order of North, J., was not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and that, consequently, the bankruptcy notice was invalid. The Divisional Court affirmed the decision. The appellant, by the leave of the Divisional Court, appealed.

Napier Higgins, Q.C., and *Herbert Stephen*, for the appellant. An order dismissing an action with costs for want of prosecution is, at any rate, a "final judgment" for the costs of the action. It decides definitely the only question in the action which the Court is asked to decide, viz., who is to pay the costs of it. The order resembles an order under Order XIV. of the Rules of the Supreme Court, 1883, or a judgment for default of appearance to a writ. In *Ex parte Moore* (1) an order for the payment of costs was held to be a "final judgment." *Ex parte Chinery* (2), *Ex parte Schmitz* (3), and *Ex parte Whinney* (4) are distinguishable. The word "final" is used only in contradistinction to "interlocutory." By s. 18 of the Act 1 & 2 Vict. c. 110, orders and decrees of the Court of Chancery have the effect of judgments. In an action for ejectment the judgment in any event only decides the right to the possession of the land at the date of the issue of the writ. That question is conclusively determined by the order dismissing the action for want of prosecution. In any new action the plaintiff could only claim possession as from the date of the issue of the new writ.

Sidney Woolf, for the respondent, was not heard.

LORD ESHER, M.R. I think the only two cases which we need consider are *Ex parte Chinery* (2), and *Ex parte Moore* (1), for the other two cases which have been cited were expressly decided upon the authority of *Ex parte Chinery* (2), and we must therefore see what was the rule of interpretation of this section laid down in *Ex parte Chinery* (2) as further explained in *Ex parte Moore*. (1) The principle of the decision in *Ex parte Chinery* (2)

(1) 14 Q. B. D. 627.
(2) 12 Q. B. D. 342.
(3) 12 Q. B. D. 509.
(4) 13 Q. B. D. 476.

1888

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

Lord Esher, M.R.

was stated by Cotton, L.J. (12 Q. B. D. at p. 345), to be that the word "judgment" is to be construed strictly, and confined to what was previously known in law as a "judgment" as distinguished from an "order." Moreover, the "judgment" must be strictly a "final judgment." Cotton, L.J., said (12 Q. B. D. at p. 345), "No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an 'order.'" Therefore, if the Court comes to the conclusion that the thing which is in dispute is an "order" as distinguished from a "judgment," then Cotton, L.J., says that sub-s. 1 (*g*) will not authorize the issuing of a bankruptcy notice upon it.

Then, as to the meaning of the words "final judgment," Cotton, L.J., said (at p. 345): "I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established."

That definition has since been criticised, and an attempt to amend it was made in *Ex parte Moore* (1), by Lord Selborne, L.C. He said (at p. 632): "To constitute an order a final judgment nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties to it on the merits." I think that must mean an adjudication of the litis contestatio. And, with great deference to Lord Selborne, I cannot help thinking that the words "upon the merits" might have been omitted, and that the definition should have been "a proper litis contestatio and a final adjudication of it between the parties." Then Lord Selborne added (at p. 633): "No doubt in the opinions of some of the learned judges which have been read to us there are one or two expressions which seem to imply that the judgment must be one by which a pre-existing liability of the defendant to the plaintiff is ascertained; but those expressions must be taken in connection with the particular facts of the cases in relation to which they were used." I do not see

(1) 14 Q. B. D. 627.

much difference between that proposition and the other which he had already laid down, and I do not think that Lord Selborne could have intended in the latter part of his judgment to contradict that which he had said in the former part. I think he was to some extent criticising the use of the words "pre-existing liability," and saying that instead of them he would prefer to put "a pre-existing litis contestatio," that is, as I understand him, one by which the question whether there was a pre-existing right of the plaintiff against the defendant is ascertained. The decision may be either that there was, or that there was not, such a pre-existing right, but in either case the question whether there was such a right will become an ascertained and adjudged matter.

Then Cotton, L.J., finding that his former definition had been criticised, said (p. 634): "In order to decide whether a garnishee order was a final judgment, we had to consider what was the meaning of the expression 'final judgment.' It is a judgment in an action between parties brought to establish some right of the plaintiff against the defendant." Then he went on to say that his former definition "by which a previously existing liability of the defendant to the plaintiff is ascertained or established," had been criticised, and that it had been suggested that that definition would not include a judgment in an action of tort. But he added, "If a defendant has committed a tort, there is a previously existing liability on his part to the plaintiff," by which he means a pre-existing liability to damages. "So here," he continued, "there was a previously existing liability of the defendant arising out of his covenant contained in the partnership deed. Of course the order for the payment of costs did not enforce a pre-existing liability of the defendant, but that order is part of a final judgment which did." That is to say, there is no pre-existing right or pre-existing liability as regards costs which follow the result of the action. But when, as in *Ex parte Moore* (1), an order to pay costs is part of a final judgment, which determines the question whether there was a pre-existing right of the plaintiff against the defendant, that order itself is a "final judgment," for the purposes of sub-s. 1 (*g*).

(1) 14 Q. B. D. 627.

1888

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

Lord Esher, M.R.

I have no doubt that there may be a better definition than that which I am about to give, and I do not pretend that it is strictly correct; but, in my opinion, "a final judgment" means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not every one.

Then comes the question whether the order in the present case is such a judgment. Now here the plaintiff brought the action to enforce a claim of right, which he alleged existed before and at the time when he brought the action against the defendant, and the question is, was that claim finally determined? Of course it was not determined "on the merits," if by that is meant upon a trial when the facts were brought before a tribunal which had to determine them. But I do not think that Lord Selborne meant that when he said "on the merits." In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again. If between those two parties the question of the plaintiff's alleged right as existing before he brought the action was finally determined, then, whether it was tried "on the merits" or not, the order (assuming that it was a "judgment," a question which I do not intend to decide) is a "final judgment." But cannot the same question be tried again between these parties? There can be no doubt that this order was equivalent to a judgment of nonsuit, and such a judgment was never regarded as a final determination of the dispute between the parties, because the plaintiff by amending his evidence could maintain the same claim in a second action after a judgment of nonsuit in the first.

Applying the principles laid down in the two cases on which I have commented, this order, assuming it to be a judgment, was not a "final judgment," and therefore the appeal fails.

FRY, L.J. I am of the same opinion.

The respondent brought an action against the appellant to recover possession of certain lands, and by his writ he claimed

also a declaration of his title to the lands, and mesne profits. By an order made by North, J., in chambers that action was dismissed with costs, for want of prosecution. Now, to my mind, that decision, which is in terms an "order," is also in substance an "order," and I doubt whether it would be possible to hold that it was a "judgment." I think the distinction between "judgments" and "orders" is still an existing one. But, even supposing it to be a "judgment," we have to consider whether it is a "final judgment." I will not attempt to give any definition of a "final judgment," but, whether we take the definition just given by the Master of the Rolls, or the definition given by Cotton, L.J., in *Ex parte Chinery* (1), or the definition given by Lord Selborne in *Ex parte Moore* (2), nothing can be a final judgment by which there is not a final and conclusive adjudication between the parties of the matters in controversy in the action.

Has there been in the present case any final and conclusive adjudication of the matters in controversy in the action? It is said that there has been as final an adjudication as there possibly can be in such an action, because in an action for ejectment the only question raised is the title to possession of the land at the date of the issue of the writ, and that question can never be raised in any other action of ejectment. But in the present case it is not the fact that the action is a mere action of ejectment. The writ asks for a declaration of the plaintiff's title to the land, and if that declaration had been made, either for or against the plaintiff, it would be impossible, as it seems to me, to say that it would not have been a final adjudication of the title of the plaintiff and the defendant, not only with regard to the date of the writ but down to and including the time of the trial, and I cannot for a moment doubt that that declaration might have been pleaded as res judicata to a fresh action by the plaintiff. There would, therefore, have been a finality in the declaration of the title, if the action had been determined in the usual way. But, inasmuch as a new action for a declaration of title could be commenced the day after the first action was dismissed for want of prosecution, the order so dismissing it was not as final as an order in the

(1) 12 Q. B. D. 345. (2) 14 Q. B. D. 632.

1888

IN RE RIDDELL. EX PARTE EARL OF STRATHMORE.

ordinary course would have been. Therefore, it is not a "final judgment."

LOPES, L.J. I will express no opinion whether this order is a "judgment," but I am clearly of opinion that it is not a "final judgment."

Speaking for myself, I believe the definition I am about to give of the term "final judgment" as used in this subsection is a substantially good definition, though I do not say it is exhaustive. I think a "final judgment" is a final adjudication of the matters in contest in the action between the parties to the action.

It cannot be disputed that this order dismissing the action for want of prosecution does not preclude the plaintiff from commencing a fresh action for the same cause of action. To my mind, that seems a conclusive answer to the question whether the order is a "final judgment." It is not, in my opinion, and, therefore, the decision of the Divisional Court was right.

Appeal dismissed.

Solicitors for appellant: *Western & Sons.*

Solicitor for respondent: *D. E. Stanford, Newcastle-on-Tyne.*

W. L. C.

Jan. 27.

[IN THE COURT OF APPEAL.]

IN RE SCHARRER. EX PARTE TILLY.

Bankruptcy—Witness summoned for Examination respecting Property of Bankrupt—Refusal to answer Questions—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52, s. 27.

When a witness is summoned, under s. 27 of the Bankruptcy Act, 1883, for examination concerning the debtor's dealings or property, the judge is not bound to accept at once as conclusive the denial of the witness that he has dealt with such property, but the witness may be further questioned in order to test his credibility.

Re Purvis (56 L. T. (N.S.) 579) explained.

When an appeal is brought against the refusal of the Court to order a witness to answer questions put to him during his examination, the witness cannot be made a party to the appeal.

APPEAL by the trustee in the bankruptcy of Eugen Scharrer against an order made by a registrar refusing to allow any further questions to be put to F. T. Eggers, who had been summoned for

examination under s. 27 of the Bankruptcy Act, 1883, as a person capable of giving information respecting the property of the bankrupt, and discharging him from further attendance under his subpœna.

The bankrupt had traded in London as Scharrer & Co., and he was so described in the proceedings. He was also a partner in a firm of Scharrer, Tiede, & Co., which carried on business at Zanzibar in Africa. That firm had become bankrupt at Zanzibar.

In the course of his examination before the registrar Eggers was questioned about a journey which he had taken to Africa. He stated that there were certain contracts between the persons whom he then represented and the firm of Scharrer, Tiede, & Co., which had not been fulfilled, and that he had endeavoured to make that firm deliver to him some goods which were really the property of the persons whom he represented. He was then asked to give the names of the persons whom he represented, and he objected to answer the question, on the ground that he had been summoned to give information in respect of his dealings with the firm of Scharrer & Co., and that he was being asked questions relating to the firm of Scharrer, Tiede, & Co., which was a distinct firm. On being further pressed he said that he had taken no goods belonging to the firm of Scharrer & Co., and he refused to answer any questions which did not relate to that firm. The registrar held that the witness was not bound to give any information as to any dealings except with the bankrupt, the two firms being really distinct, and he made the order appealed from.

The registrar considered that he was bound, by reason of the decision of Cave, J., in *Re Purvis* (1), to accept the denial of the witness as conclusive.

The notice of appeal asked for an order directing Eggers "to submit himself for examination touching his dealings with the property belonging to or in the possession of the bankrupt," or belonging to or in the possession of Scharrer, Tiede, & Co., and the notice was served only on Eggers.

Cooper Willis, Q.C., and *Yelverton*, for the appellant. The witness was bound to answer questions relating to his dealings with

(1) 56 L. T. (N.S.) 579.

1888

IN RE SCHARRER. EX PARTE TILLY.

goods belonging to the firm of Scharrer, Tiede, & Co. It is not enough to say that that was a distinct firm, for the bankrupt was a partner in it, and his interest in the property of that firm is part of his property, which vests in the trustee in his bankruptcy. *Re Purvis* (1) apparently lays down that the answer of a witness, who is summoned for examination under s. 27, is conclusive, and that he cannot be cross-examined upon it for the purpose of testing his credibility. If that is what Cave, J., decided, his view of the power of the Court under s. 27 was wrong. The denial of the witness that he has dealt with the property of the bankrupt is not conclusive; the object of s. 27 is to extract from an unwilling witness information as to the existence and situation of property of the bankrupt.

[LORD ESHER, M.R.:—How can the witness be made respondent to this appeal?]

The registrar could not properly have been made a respondent to the appeal: *Ex parte Izard.* (2) If the registrar had ordered the witness to answer he could have appealed: *Ex parte Reynolds.* (3) There must be equally a right of appeal when the registrar has wrongly refused to allow questions to be put, and the witness is directly interested in the matter. The Court can disregard the form of the appeal, and may make an order directing the registrar to allow the questions to be put.

The witness appeared in person, but was not called upon.

LORD ESHER, M.R. It seems to me impossible that this appeal can succeed. The notice of appeal really asks for an order upon the witness to submit himself for examination. If that order were made, and he refused to answer, the next step, I suppose, would be to apply for an attachment against him for not answering. In the course of his examination before the registrar he objected to answer certain questions; the registrar was asked to order him to answer, and he declined to do so. Therefore the witness has not refused to answer any questions which he was ordered by the registrar to answer, but he did not answer certain questions which the registrar ruled that he was not bound to

(1) 56 L. T. (N.S.) 579. (2) 20 Ch. D. 703.
(3) 20 Ch. D. 294.

answer. The witness ought not, therefore, to have been made a respondent to such an appeal; no application ought to have been made against him.

It is said that the registrars have felt great difficulties by reason of *Re Purvis* (1); in which case it is said Cave, J., held that, when a witness is being examined under s. 27, the registrar is bound to accept the first answer which he gives, and, if he says that he knows nothing about the matter, the registrar is bound to accept that first answer, and not to allow any other question to be put to him. Cave, J., it is said, held that the witness cannot be asked any questions which go to his credit, but that his first answer must be accepted, without testing him whether he will stand by it or not. I have spoken to Cave, J., and he tells me that he is astonished that any one could have put such a construction on what he said in *Re Purvis* (1); and that he never intended to say that the judge was bound to accept the witness's first answer, or that he could not be cross-examined and sifted to the end. Cave, J., tells me that he merely meant to say that at the end of the witness's examination his answer must be accepted, that is, witnesses cannot be called to contradict him. Now, taking that to be the true construction of *Re Purvis* (1), it does not present the difficulties which it is suggested it has presented to the minds of the registrars. Further than that, I do not desire to put any particular construction on s. 27, because we have not had the assistance of counsel on both sides, and it is not necessary that we should express any opinion. But with that explanation of *Re Purvis* (1), which I am authorized by Cave, J., to give, I entirely agree.

Under these circumstances the appeal must be dismissed, but the dismissal will be without prejudice to any application which may be made to the registrar to require the attendance, or the further attendance, of the witness for examination. We give no recommendation to the registrar; we only leave it to him without prejudice to exercise his own judgment upon the matter.

FRY, L.J. I am of the same opinion. The power of examination is by s. 27 expressly vested in the Court, and the person

(1) 56 L. T. (N.S.) 579.

1888

IN RE SCHARRER. EX PARTE TILLY.

FRY, L.J.

summoned is not, therefore, in the ordinary position of a witness called by a litigant party in order that he may be examined by the two litigant parties before the Court, but he is, so to speak, the witness of the Court. No doubt it has been the common practice, and I have no doubt it is a convenient practice, to allow the counsel or other representative of the trustee or the official receiver to put the questions, but still the conduct of the examination rests with the Court. I will say nothing now upon the question whether the official receiver, or the trustee, if he is dissatisfied with the way in which the registrar has exercised his discretion, may bring the matter for reconsideration, either before the bankruptcy judge or before this Court, whichever may be the proper tribunal. It may be that there would be a right of appeal, on the ground that the registrar had not allowed the examination to go far enough. I entertain no doubt that this power of examination is not a merely formal one, but that it enables the Court to examine the witness usefully and fruitfully—to sift the matter in hand so far as may be necessary for the information of the Court, and as the Court may require. I am not disposed to determine now the extent to which the examination might go. For aught I can see, it might go as far as the judge might consider necessary in order to bring out the real facts of the case, so far as the witness is capable of giving the information.

In the present case the registrar refused to put the questions, and the witness, who is made a respondent to this appeal, has only obeyed the instructions of the Court in not answering. If the registrar had decided that the questions ought to be answered, there is nothing to shew that the witness would not have obeyed the ruling. We have, therefore, an application that the witness may be ordered to give certain information upon oath which the registrar has not required him to give. It appears to me that such an application is entirely irregular and improper.

It has been suggested that, instead of doing that, we should give a direction to the registrar to allow the questions to be put, but I decline to depart from the terms of the application, which appears to me an improper one. Without suggesting that the registrar was in any way fettered by the gloss which has been

1888

IN RE SCHARRER. EX PARTE TILLY.

put upon *Re Purvis* (1), it seems to me that, he having exercised his discretion in not requiring the witness to answer these questions, it is impossible for us to make the order which is asked. The appeal must be dismissed, with any costs which have been incurred by the respondent.

LOPES, L.J. I entirely agree. I only wish to add that I could not have agreed with *Re Purvis* (1), as the effect of it was described to us, nor, indeed, with it as it is reported in the *Law Times*. But, as that case has now been explained to us, I entirely concur with it. I should be extremely sorry to see too limited a construction put upon s. 27, which I consider a most useful and valuable section. If the registrar felt himself in any way fettered by *Re Purvis* (1) he will now be relieved from that difficulty.

Appeal dismissed.

Solicitor: *C. Harcourt.*

W. L. C.

[IN THE COURT OF APPEAL.]

Feb. 9, 10, 23.

REEVE *v.* BERRIDGE.

Vendor and Purchaser—Agreement for purchase of Lease—Constructive Notice of Covenants in Lease—Onerous Covenants.

When an agreement has been entered into for the purchase of an existing lease, the purchaser is not affected with constructive notice of the covenants contained in the lease, and is not bound to complete the contract if the lease is subject to onerous covenants of an unusual character, unless before the agreement was made he had a fair opportunity of ascertaining for himself the terms of such covenants.

The principle of the decision in *Hyde* v. *Warden* (3 Ex. D. 72) applies to an agreement to purchase an existing lease, as well as to an agreement to take an underlease.

APPEAL against a decision of Stephen, J.

The following statement of the facts is taken from the judgment of the Court of Appeal:—

The plaintiff had on March 11, 1886, entered into an agreement with Mr. Roupell, the owner of a building estate in Kent, under which he was entitled to leases of certain plots of land, when houses should have been built thereon.

(1) 56 L. T. (N.S.) 579.

1888

REEVE v. BERRIDGE.

On August 13, 1886, the plaintiff and the defendant signed two documents, constituting an agreement between them, by which the plaintiff agreed to sell, and the defendant agreed to purchase, for 615*l.*, a house which had then been built on one of the plots of land, for the residue then unexpired of a term of about eighty-and-a-half years from September 29, 1886, at a ground rent mentioned. The vendor agreed to make out a title to the property as leasehold. A deposit of 20*l.* was paid by the purchaser, and by the agreement the vendor agreed, on payment of the remainder of the purchase-money on September 29 then next, to execute an assignment to the purchaser, and it was further stipulated that, if either party refused to perform the agreement on his part, he should pay to the other of them who should be willing to complete the sum of 100*l.*, exclusive of the deposit, and it was further provided that on completion the purchaser should enter into the usual covenants to indemnify the vendor against the rent and covenants of the original lease.

The defendant on September 29 refused to complete, and the plaintiff brought this action for the 100*l.*, the stipulated payment for default, less 50*l.* received on account of the purchase-money in addition to the original deposit of 20*l.*

The defendant delivered a counter-claim, asserting that he was entitled to the 100*l.*, on the ground that it was the plaintiff who had really refused to perform the contract, and claiming also the return of the 70*l.* already paid by him on account of the purchase-money.

The plaintiff asserted that he was able and willing to complete on September 29, the day named for completion. The defendant denied this and contended, first, that the plaintiff could not make out such a title as he was by law bound to do, by reason of the existence of onerous covenants in the lease; and, secondly, that the plaintiff had not at the time fixed for completion any lease vested in him which he could convey, and that the equitable interest, which alone he possessed on September 29, would not support his right to enforce payment from the defendant.

The plaintiff was under his building agreement bound to take the lease subject to certain onerous covenants, such as a covenant against carrying on certain trades, which were admitted not to

be usual or ordinary covenants, and he proposed to assign to the defendant a lease thus burthened. To this the defendant objected, and said that he was entitled to a lease subject only to the ordinary covenants. To this the plaintiff replied, that the terms of the contract itself disclosed the fact that the property was leasehold, and that the defendant must be taken to have had notice of the lease and of all its contents, and, consequently, that he was precluded from raising any objection based on the existence of anything in the lease.

The agreement between the plaintiff and Roupell was not shewn to the defendant, and no opportunity was offered to him of inspecting it or ascertaining its contents for himself.

Stephen, J., gave judgment for the defendant on both the claim and the counter-claim. He decided in favour of the plaintiff that the defendant must be taken to have had constructive notice of the contents of the agreement between the plaintiff and Roupell, but he held in favour of the defendant that the equitable interest, which alone the plaintiff possessed on September 29, 1886, did not entitle him to recover the 100*l.* from the defendant.

The plaintiff appealed.

Feb. 9, 10. *Gully, Q.C.*, and *H. A. Forman*, for the appellant. The defendant had by his agreement to purchase notice of the existence of the agreement for a building lease, and he had, therefore, constructive notice of the contents of that agreement, and of the covenants which were to be contained in the lease, and he cannot now object to them: *Grosvenor* v. *Green* (1); *Hall* v. *Smith* (2); *Martin* v. *Cotter* (3); *Pope* v. *Garland* (4); *Walter* v. *Maunde* (5); *Cosser* v. *Collinge*. (6)

Hyde v. *Warden* (7) does not apply to the present case for two reasons: (1.) The action there was for the specific performance of an agreement to accept an underlease, and the Court has a discretion as to granting specific performance. In the exercise of that discretion the Court would refuse to compel a purchaser to take something different from what he supposed that he had

(1) 28 L. J. Ch. 173.
(2) 14 Ves. (426).
(3) 3 J. & Lat. 496, 506.
(4) 4 Y. & C. Ex. 394.
(5) 1 J. & W. 181.
(6) 3 M. & K. 283.
(7) 3 Ex. D. 72.

1888

REEVE v. BERRIDGE.

bought. (2.) In *Hyde* v. *Warden* (1) it was held that, upon an agreement to grant an underlease, the grantee had constructive notice of the provisions of the original lease only when he had had a fair opportunity of ascertaining for himself what they were. But there is a material distinction between an agreement to take an underlease and an agreement to take an assignment of an existing lease. The principle of *Hyde* v. *Warden* (1) does not apply to an agreement to purchase an existing lease. The defendant has expressly agreed to indemnify the plaintiff against the covenants in the original lease.

[FRY, L.J., referred to *Wilbraham* v. *Livesey*. (2)]

The maxim caveat emptor applies.

As to the other point, on which Stephen, J., decided against the plaintiff, the plaintiff on the day fixed for completion had a good equitable title, and could obtain a lease from the owner of the land at any time. *Forrer* v. *Nash* (3) does not apply.

R. O. B. Lane for the defendant. *Hyde* v. *Warden* (1) is a decision of the Court of Appeal and is binding on this Court. It must be taken to have overruled any previous cases which are inconsistent with it. The principle of it applies to the present case. The foundation of the decision is this, that restrictive covenants diminish the value of property: *Flight* v. *Booth*. (4) In *Grosvenor* v. *Green* (5) it was assumed that the purchaser had the lease before him when he made his bargain.

In the case of an agreement to purchase a lease time is of the essence of the contract, and the purchaser is not bound to wait while the vendor is making good his legal title: *Brumfit* v. *Morton* (6); *Brewer* v. *Broadwood*. (7)

Forman, in reply. *Brumfit* v. *Morton* (6) was a suit for specific performance, and the bill was dismissed without prejudice to an action for damages.

Cur. adv. vult.

Feb. 23. FRY, L.J., delivered the judgment of the Court (Lord Esher, M.R., and Fry and Lopes, L.JJ.), and, after stating

(1) 3 Ex. D. 72.
(2) 18 Beav. 206.
(3) 35 Beav. 167.
(4) 1 Bing N. C. 371.
(5) 28 L. J. (Ch.) 173.
(6) 3 Jur (N.S.) 1198.
(7) 22 Ch. D. 105.

the facts as above, continued:—It is plain from the facts of the case that the lease was, in fact, not in existence at the date of the contract, that the agreement between the plaintiff and Mr. Roupell was not in fact shewn to the defendant, and that no opportunity was offered to the defendant of inspecting that agreement, or learning any particulars with relation to its contents. The question, therefore, is, how far the mere notice of the lease in the contract, without any opportunity of inspecting it, or the agreement for a lease, affects the purchaser with notice of all the contents of that agreement. This question appears to us to be really covered by the authority of *Hyde* v. *Warden*. (1) In that case the question arose, whether the taking possession of property agreed to be underleased, with notice of the existence of the lease, was a waiver of all objections based on the terms of the lease. The question, therefore, so far as regards the question of notice, was the same as in the present case, and the Court was pressed to decide that notice of the lease was notice of its contents, and that on the authority of various cases including *Cosser* v. *Collinge*. (2) The Court rejected the argument, and said (3): "We think it may be considered as settled that the principle of that case can only be applied where (as, indeed, was the case in *Cosser* v. *Collinge* (2)) the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease: see *Grosvenor* v. *Green* (4); *Smith* v. *Capron*." (5)

It was argued before us that the question in *Hyde* v. *Warden* (1) arose on a contract for a sub-lease, whilst in the present instance the question arises with relation to a contract for the assignment of a lease. But we are of opinion that there is no substance in such a distinction, because in both cases alike the purchaser must know that his vendor can confer on him no interest except one subject to the covenants contained in the lease, and the effect of notice must therefore be alike in both cases.

Criticisms on *Hyde* v. *Warden* (1) were also addressed to us, and in particular we were asked to hold it inconsistent with *Grosvenor* v. *Green* (4), which was decided by Lord Hatherley

(1) 3 Ex. D. 72.
(2) 3 M. & K. 283.
(3) 3 Ex. D. p. 80.
(4) 28 L. J. (Ch.) 173.
(5) 7 Hare, 185.

1888

REEVE v. BERRIDGE.

Fry, L.J.

when Vice-Chancellor. But in this Court we are bound by the authority of *Hyde* v. *Warden* (1), and we cannot but observe that there is great practical convenience in requiring the vendor, who knows his own title, to disclose all that is necessary to protect himself, rather than in requiring the purchaser to demand an inspection of the vendor's title deed before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not, in our opinion, in accordance with the usual course of business in sales by private contract.

Upon this point, therefore, we are not able to concur with Stephen, J., and we regret that *Hyde* v. *Warden* (1) was not cited to him.

The conclusion at which we have arrived on this point is sufficient to support the judgment of the Court below, and it is therefore unnecessary to enter upon any inquiry as to the other objection to the vendor's title on which Stephen, J., decided in favour of the purchaser. It was not argued that, if the plaintiff was really in default in performance of the contract on his part, the 100*l.* could not be recovered by the defendant. The appeal, therefore, fails, and must be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *E. Talfourd Hughes.*
Solicitors for defendant: *H. H. Mason & Son.*

W. L. C.

(1) 3 Ex. D. 72.

McGREGOR *v.* McGREGOR.

1887
Nov. 15.
1888
Jan. 24.

Husband and Wife—Action by Wife for Money due under Agreement for Separation—Power of Wife to contract without Intervention of Trustee—Agreement not to be performed within a Year—Executed Consideration—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

A husband and wife having taken out cross-summonses against each other for assaults, entered into a verbal agreement with each other to withdraw the summonses and to live apart, the husband allowing the wife a weekly sum for maintenance, and the wife indemnifying the husband against any debts she might contract. An action having been brought in the county court by the wife against her husband for six weeks' arrears of maintenance under the agreement:—

Held, that the husband and wife had power to contract, without the intervention of a trustee, to live apart, in consideration of their agreeing not to take legal proceedings against one another, and that the action was maintainable:

Held, also, that, the consideration being executed, the wife was entitled to recover as for "money paid at the defendant's request" at the rate fixed by the verbal agreement, even assuming that the agreement was one "not to be performed within one year," under s. 4 of the Statute of Frauds.

APPEAL from the judge of the County Court of Newcastle-upon-Tyne.

The following is a sufficient summary of the facts, which are fully set out in the judgment.

The plaintiff and defendant, who were wife and husband, took out cross-summonses against each other for assaults, but before the hearing a verbal agreement was entered into by them by which the summonses were to be withdrawn, and the plaintiff and defendant were to live separate, the defendant agreeing to pay the plaintiff 1*l.* a week for the maintenance of herself and children, and the plaintiff agreeing to indemnify the defendant against any debts which she might contract. The defendant, the husband, having failed to pay the weekly allowance, the wife issued a plaint against him for 6*l.*, being six weeks' arrears of the agreed weekly sum for maintenance. The learned county court judge gave judgment for the plaintiff. The defendant appealed.

J. Lawson Walton, for the defendant. This is not a contract which can be enforced between husband and wife; it is a mere agreement for separation, without the intervention of trustees, the consideration being on the one hand to allow the wife a weekly sum for maintenance, and on the other hand to indemnify

1888

McGREGOR v. McGREGOR.

the husband against the wife's debts. It is laid down in Story's Equity Jurisprudence, sec. 1428, as the result of the decided cases, that "a deed of separation entered into by the husband and wife alone, without the intervention of trustees, is utterly void." There was no consideration for the husband's promise, as there was no promise by trustees to indemnify him against the wife's debts. The Married Women's Property Act, 1882, does not give a married woman power to make such a contract; it gives her no general or personal right of contracting, but only a power to contract in respect of her separate estate existing at the time of the contract: *Palliser* v. *Gurney*. (1) The result of that case is that this is a mere personal contract by a married woman with her husband which cannot be enforced against her, and upon which she is also unable to sue.

Secondly, the agreement was for an indefinite term, and therefore for the duration of the joint lives of the plaintiff and defendant. It is therefore primâ facie for more than a year, and is an agreement that is "not to be performed within the space of one year from the making thereof" within s. 4 of the Statute of Frauds: *Eley* v. *Positive Life Assurance Co.* (2); *Davey* v. *Shannon*. (3)

Lastly, the action is in substance a claim for specific performance of the agreement, and the county court has no jurisdiction to entertain it; it is merely brought in its present form in order to give the county court an apparent jurisdiction.

Stuart Sim, for the plaintiff. This case is distinguishable from *Palliser* v. *Gurney* (1); that was an action against the wife by a third party, and it was held that he must shew her to be possessed of separate estate at the time of the contract; but a wife suing her husband need not shew it. The doctrine there enunciated that a married woman has only a right to contract in respect of her separate property, and that she has no personal right to contract, cannot extend to a contract to live apart from her husband, for the judgment of Jessel, M.R., in *Besant* v. *Wood* (4) is an authority that she can so contract, and shews that the intervention of a trustee is unnecessary. The effect of s. 12 of the Married Women's Property Act, 1882, is that a married woman can sue her husband upon an agreement to live apart.

(1) 19 Q. B. D. 519.
(2) 1 Ex. D. 20.
(3) 4 Ex. D. 81.
(4) 12 Ch. D. 605.

This agreement is not within s. 4 of the Statute of Frauds; it need not necessarily last longer than a year: *Souch* v. *Strawbridge*. (1)

[He also cited *In re March, Mander* v. *Harris*. (2)]

Lawson Walton, in reply. The decision in *Palliser* v. *Gurney* (3) shews that the onus is on the person seeking to set up a contract binding on the wife, and the onus is not displaced by the fact that it is the wife herself who is seeking to set it up. As to the power of a wife to contract to live apart, *Legard* v. *Johnson* (4) is a conclusive authority that a suit in equity could never have been maintained to enforce such a contract where the husband and wife assumed to contract without the intervention of trustees. As to the point upon the Statute of Frauds, *Souch* v. *Strawbridge* (1) was distinguished by Hawkins, J., in *Davey* v. *Shannon*. (5)

Cur. adv. vult.

1888. Jan. 24. The judgment of the Court (Stephen and A. L. Smith, JJ.) was delivered by

A. L. SMITH, J. This was an action brought in the County Court of Newcastle-upon-Tyne to recover 6*l.*, being six weeks' arrears of maintenance contracted by a husband to be paid to his wife under the following circumstances:—

The plaintiff and defendant before and at the time of the contract hereafter referred to were and still are husband and wife. On several occasions prior to the month of June, 1886, the defendant's ill-usage had obliged the plaintiff to apply to the police for protection against her husband, and in the month of June, 1886, she was compelled to take out a summons against him for assault. The defendant thereupon took out a cross-summons against the plaintiff. On July 1, 1886, when the summonses were about to come on for hearing at the police court, negotiations took place between the respective solicitors of the plaintiff and defendant, and it was thereupon agreed between the plaintiff and the defendant "that they should live separate and apart; that the defendant should pay to the plaintiff 1*l.* per

(1) 2 C. B. 808.
(2) 24 Ch. D. 222; 27 Ibid. 166.
(3) 19 Q. B. D. 519.
(4) 3 Ves. 352.
(5) 4 Ex. D. 81.

1888

McGREGOR v. McGREGOR.

A. L. Smith, J.

week, and that she should therewith maintain herself and her three children; that she should indemnify her husband against any debts contracted by her; and, further, that the summonses should be withdrawn." The above are the findings of the county court judge. He also found that nothing had occurred to rescind or affect the agreement, and, as we understand, that the plaintiff had done all things on her part to entitle her to have it carried out and performed by the defendant. So matters stood when the present action was brought. The county court judge gave judgment for the plaintiff, and the defendant appealed.

It was contended by Mr. Walton, on the defendant's behalf, that notwithstanding the contract existing as found by the judge, no action was maintainable by the wife against the husband thereon, and that at any rate in an ordinary action in the county court upon the agreement, as this was, no relief could be given to the wife. He said that the husband and wife being one, no contract could be entered into between them, and consequently that the one could not sue the other upon an alleged breach of what could not exist; that it was impossible for parties standing in the relation of husband and wife to contract without the intervention of a trustee; and that even if he was wrong in the above, the Statute of Frauds was an answer to the case, the contract being one not to be performed within the space of one year from the making thereof. The county court judge came to the conclusion, that by reason of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the plaintiff was entitled to contract as she did with the defendant. It should be pointed out that he came to this conclusion before the case of *Palliser* v. *Gurney* (1) was reported. We are unable to agree with the county court judge in holding that the Married Women's Property Act, 1882, gave the power to the wife to contract with the husband as she did in this case, and we are of opinion that it did not; but the question still remains whether, under the circumstances found to exist in the present case, the husband and wife had not the power to contract as they did.

It seems to us to be now too late to argue, as it was argued before us, that a husband and wife, in consideration of not taking

(1) 19 Q. B. D. 519.

proceedings the one against the other for matrimonial offences, cannot contract to live separate and apart, and that the Courts will not grant relief when such a contract is in fact made. In our judgment the law is that, when circumstances exist between husband and wife which would or which might give rise to proceedings by way of suit for matrimonial offences, it is competent in consideration of the one not taking such proceedings against the other for the two to contract to live separate and apart, and that the Courts will enforce the stipulations of such a contract when made. In the case of *Wilson* v. *Wilson* (1) the House of Lords decided that a deed of separation between husband and wife was not against public policy, whatever might have been argued upon this point prior to that decision. In *Hunt* v. *Hunt* (2), Lord Westbury, it would seem, thought that a husband and wife under the circumstances above mentioned could contract, and that such contract ought to be enforceable by the one against the other. The President of the Probate Division, Sir James Hannen, in *Marshall* v. *Marshall* (3), so held, as did the late Master of the Rolls, Sir George Jessel, in *Besant* v. *Wood* (4).

It seems to us that the power of the husband and wife to contract under the circumstances existing in the present case is settled by judicial authority, and the reasons for so holding are so cogently pointed out by Sir George Jessel in *Besant* v. *Wood* (5) that we do not extract or recapitulate them, but adopt them in this judgment. It follows from the above that the point taken that there is no trustee with whom the husband and wife may respectively contract will not avail the defendant, and that the passage from Story's Equity Jurisprudence, sec. 1428, and the decision of Lord Eldon in *Legard* v. *Johnson* (6), are not applicable to cases like the present.

We wish also to point out that in *Rowley* v. *Rowley* (7) there was merely, as it appears, an agreement between husband and wife, who were then parties to divorce proceedings, to compromise the suit upon terms. The House of Lords held such to

(1) 1 H. L. C. 538.
(2) 4 D. F. & J. 221.
(3) 5 P. D. 19.
(4) 12 Ch. D. 605.
(5) 12 Ch. D. at pp. 621, 622.
(6) 3 Ves. 352.
(7) Law Rep. 1 H. L., Sc. 63.

1888

McGREGOR v. McGREGOR.

A. L. Smith, J.

be a valid binding agreement between the parties, and gave effect to its provisions. There was no trustee or anything of the sort in the case. If, then, an agreement between husband and wife to compromise a suit is valid and binding, why, we would ask, is not an agreement to live separate and apart without bringing the suit to be valid and binding, the consideration being the existence of facts which would give jurisdiction to the Court? In our opinion it is, and such consideration existed in the present case, namely, a charge of cruelty against the husband.

As to the point taken that this was an ordinary county court action, and not a proceeding upon the equity side of the Court, it should be noticed that the effect of ss. 24 and 25 of the Judicature Act, 1873, and ss. 89, 90, and 91 of the same Act, are such as to give power to the county court to grant relief, even though the action in form is a common law action for debt, in as ample a manner as if it had been an action in the superior court.

Now as to the Statute of Frauds. Various cases were cited in argument upon the one side and the other as to whether this agreement was or was not within the statute as being an agreement "not to be performed within the space of one year from the making thereof." The county court judge held it not to be within the statute. But, be this as it may, it seems to us that inasmuch as this is an action to recover six weeks' arrears of maintenance, the plaintiff is entitled to recover as for money paid at defendant's request, the consideration being executed, and that this point was expressly decided in plaintiff's favour in the case of *Knowlman* v. *Bluett* (1), in the Exchequer Chamber, which is really undistinguishable from the present case.

For the reasons above we give judgment for the respondent, and with costs.

Appeal dismissed.

Solicitors for defendant: *Williamson, Hill, & Co., for Whitehorn, North Shields.*

Solicitors for plaintiff: *Pyke & Parrott, for Joel & Pearson, Newcastle-on-Tyne.*

(1) Law Rep. 9 Ex. 307.

W. J. B.

CREW *v.* CUMMINGS.
WOOD, CLAIMANT.

1888
Feb. 2.

Bill of Sale—Affidavit—Accidental Omission of Particulars prescribed by the Act—Rectification of Omission—"The Register"—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-ss.* 2, 12, 14.

Sect. 14 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 31,—which enables a judge, on being satisfied that the omission or misstatement of the name, residence, or occupation of any person was accidental, &c., to order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation,—is limited by the description of "register" in s. 12, and the judge—where the affidavit filed with the registrar under s. 10, sub-s. 2, has by inadvertence omitted to describe the residence and occupation of an attesting witness—has no power to allow an affidavit to be filed supplying such particulars.

APPEAL from an order made by Field, J., in the trial at chambers of an interpleader issue to try the right to goods taken in execution by the plaintiff as execution creditor as against the claimant under a bill of sale. The order allowed the claimant to file a supplemental affidavit setting out the residence and occupation of one of the attesting witnesses to the bill of sale, which were alleged to have been inadvertently omitted in the affidavit filed with the registrar at the time of its registration.

Kisch, for the execution creditor. The order is invalid. A judge has no power to allow (1) the affidavit filed under s. 10,

(1) By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10: "A bill of sale shall be attested and registered under this Act in the following manner . . . sub-s. 2. Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed with the registrar within seven days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed."

By s. 12: "The registrar shall keep a book (in this Act called "the register") for the purposes of this Act, and shall, upon the filing of any bill of sale or copy under this Act, enter therein (in the form set out in the

1888

CREW v. CUMMINGS.

sub-s. 2, of the Bills of Sale Act, 1878, to be altered or supplemented. His power of rectifying mistakes is defined in s. 14, and is limited to causing insertions to be made in the "register," that is, in the "book" which the registrar has to keep according to s. 12. The form in Schedule B. which is referred to in s. 12 does not contain a space for the address and occupation of the attesting witnesses, and entries in the book are, perhaps, not a part of the process of registration under s. 10, sub-s. 2. But s. 14 limits the judge's power to the insertion of particulars in this "book."

Bassett-Hopkins, for the claimant. The order is valid. The obvious intention of the Act is that the judge shall have power to remedy all technical defects in the registration of bills of sale. The words "insertion in the register" in s. 14 should be construed as referring to the process of registration in s. 10, sub-s. 2.

MATHEW, J. I decide with reluctance that this appeal should be allowed. The objection to the order is technical, but I am not satisfied that the Court can decide in the respondent's favour

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second schedule (B.) to this Act, or in any other prescribed form) the name, residence and occupation of the person by whom the bill was made or given . . . and the other particulars shewn in the said schedule or to be prescribed under this Act."

SCHEDULE B.

Satisfaction entered.	Number.	By whom given, or against whom process issued.			To whom given.	Nature of instrument.	Date.	Date of registration.	Date of registration of affidavit of renewal.
		Name.	Residence.	Occupation.					

By s. 14: "Any judge of the High Court, on being satisfied that the omission to register a bill of sale or an affidavit of the renewal thereof within the time prescribed by this Act, or the omission or misstatement of the name, residence or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct."

without doing violence to the language of the statute. The Act provides that for the purpose of registering a bill of sale it shall be necessary to file an affidavit stating the address and occupation of each of the attesting witnesses. In this case the address and occupation of one of the attesting witnesses were accidentally omitted in the affidavit filed when the bill of sale was given. The Act no doubt intends that such an omission may be rectified, but unfortunately in s. 14 it expressly provides that the rectification shall be effected by means of a judge's order for the "insertion in the register" of the "true residence and occupation" of the witness. The "register" is defined in the 12th section. It is a book which the registrar is to keep and in which he is to make an entry of certain particulars relating to each bill of sale in a prescribed form. The form in the schedule to the Act does not contain a space for the addresses and occupations of the attesting witnesses. The language of s. 14 is, however, clear, and the order not being an order for the "insertion in the register" of the omitted particulars, is not in conformity with the Act.

A. L. SMITH, J. I am of the same opinion. There is a flaw in the statute. The order is one which I can well suppose that I should myself have made at chambers, though perhaps I might have made it without prejudice to the rights of the execution creditor. But s. 14 does not give the judge power to make this order. It is impossible, in the face of the definition of "register" given in s. 12 to construe s. 14 as investing the judge with any general discretion as to the correction of errors accidentally made in the process of registration. In my opinion, and I regret that it should be so, the Act does not permit the correction of a mistake in the affidavit which is filed under the Bills of Sale Act, 1878, as a part of the process of registration.

Appeal allowed.

Solicitor for execution creditor: *J. S. Rubinstein.*
Solicitor for claimant: *Buckler.*

H. D. W.

1888
Feb. 13.

GRAHAM AND OTHERS *v.* EDGE AND ANOTHER (THE OFFICIAL LIQUIDATORS OF THE BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY).

Company—Unregistered Company—Action against Official Liquidator—Right to stay of Action—Effect of Vesting Order—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 92, 203.

After an order had been made for winding up an unregistered company under the Companies Act, 1862, the plaintiffs, without leave of the Court in the winding-up, sued the defendants to recover rent charged on property which had vested in the defendants as official liquidators pursuant to s. 203 of the Act:—

Held, by Huddleston, B., and Manisty, J. (Manisty, J., doubting), that the action must be stayed as having been commenced against a company in liquidation without the leave of the Court contrary to s. 87 of the Act.

APPLICATION by the defendants, the official liquidators of the Blackburn and District Benefit Building Society, to stay the action.

The society was an unregistered company. The action was brought to recover arrears of ground rent charged on property which had become vested in the defendants as official liquidators under a vesting order made in pursuance of s. 203 of the Companies Act, 1862 (25 & 26 Vict. c. 89). The order was made in 1882. The defendants paid the rent up to 1885, but declined to pay it subsequently. The action was brought without leave of the Court in the winding-up proceedings.

The application came before Hawkins, J., at chambers, and was referred by him to the Court.

Joseph Walton, for the defendants. The action having been brought without leave of the Court in the liquidation the defendants are entitled to have it stayed under s. 87 (1) of the Companies Act, 1862, as an action against the company. It is

(1) By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 87: "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose."

By s. 92: "For the purpose of conducting the proceedings in winding-up a company and assisting the Court therein there may be appointed a person or persons to be called an official liquidator or official liquidators."

By s. 203: "If any unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may, by the order made for winding-up

not suggested that the official liquidators have personally guaranteed the payment of the rent, and apart from such an undertaking, they cannot be made personally liable.

[MANISTY, J. Cannot this objection be taken by way of defence?]

The contrary was decided in *Gray* v. *Raper*. (1) The remedy of the plaintiffs is by proof in the liquidation.

Ernest Pollock, for the plaintiffs. The effect of a vesting order made under s. 203 of the Companies Act, 1862, is to render the official liquidators personally liable in respect of "actions relating to the property vested." The position of the defendants is analogous to that of a trustee in bankruptcy, who, if he takes possession of leasehold property, renders himself personally liable to the landlord for the rent, though he is entitled to an indemnity out of the estate: *Ex parte Dressler, In re Solomon*. (2)

Joseph Walton, in reply. The Act does not enable an official liquidator to disclaim leasehold property, like a trustee in bankruptcy. The words of s. 203, "such property is to vest in the official liquidator or official liquidators by his or their official name or names," shew that it was intended that the official liquidators should be mere nominal plaintiffs and defendants without personal rights or liabilities.

HUDDLESTON, B. I think the defendants are entitled to an order for the discontinuance of the action. The action being brought against the official liquidators, who alone can be sued

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such company, or by any subsequent order, direct that all such property, real and personal, including all interest, claims, and rights into and out of property, real and personal, and including things in action, as may belong to or be vested in the company or to or in any person or persons in trust for or on behalf of the company, or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names, and thereupon the same, or such part thereof as may be specified in such order, shall vest accordingly, and the official liquidator or official liquidators may, in his or their official name or names, or in such name or names, and after giving such indemnity as the Court directs, bring or defend any actions, suits, or other legal proceedings relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purposes of effectually winding up the company and recovering the property thereof."

(1) Law Rep. 1 C. P. 694.

(2) 9 Ch. D. 252.

1888

GRAHAM v. EDGE.

as the company under s. 203 of the Companies Act, 1862, is substantially, in my opinion, an action against the company within the meaning of s. 87 of the Act.

MANISTY, J. Were there no appeal I should hesitate to make this order. I fear we may be putting a somewhat loose construction on s. 87 of the Companies Act, 1862, but, looking to the definition of the functions of official liquidators given in s. 92, it seems reasonable to regard this action as one brought against the company within s. 87, and I do not dissent.

Order that the action be discontinued.

Solicitors for plaintiffs: *Pritchard, Englefield, & Co.*
Solicitor for defendants: *Needham.*

H. D. W.

Jan. 30, 31.

IN RE STEPHENSON. EX PARTE THE OFFICIAL RECEIVER.

Bankruptcy—Act of Bankruptcy—Assignment of Property to Trustee for the Benefit of Creditors generally—Right of Party to the Assignment to prove in Bankruptcy—Release—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-s.* (*a*), *s.* 43.

The debtor executed an assignment of his property to a trustee for the benefit of his creditors. The deed provided for the distribution of the assets by the trustee rateably among all the creditors, and contained a covenant by which "in consideration of the premises," the creditors, parties to the deed, agreed to "release the debtor from all claims and demands" against him. The debtor was adjudicated bankrupt upon the petition of a non-executing creditor, the act of bankruptcy proceeded upon being the execution of the deed:—

Held, that the deed sufficiently shewed that the release was not intended to bind the executing creditors in the event of bankruptcy, and that they were entitled to prove.

APPEAL by the official receiver from an order of the County Court of Nottingham, requiring him to admit the proof of a creditor.

The creditor was trustee for the creditors of the debtor and himself a creditor under a deed of assignment made by the debtor in September, 1887, for the benefit of his creditors generally, with the approval of a majority of them. The petitioning creditor dissented and presented a bankruptcy petition, treating the deed as an act of bankruptcy under s. 4, sub-s. (*a*), of the Bank-

1888

IN RE STEPHENSON. EX PARTE OFFICIAL RECEIVER.

ruptcy Act, 1883. A receiving order was in consequence made. The ground on which the appellant held that the debt was not provable was, that it was extinguished by the deed. This deed purported to convey to the trustee all the real and personal estate of the debtor in trust to realize it by sale or otherwise, and, subject to charges having priority and to the rights of secured creditors, to divide the proceeds "among all the creditors rateably." It contained the following clause: "In consideration of the premises the creditors parties hereto release the debtor from all claims and demands." The deed had been executed by the respondent.

Sir R. E. Webster, A.G. (with him, *Sir E. Clarke, S.G.*, and *Muir Mackenzie*), for the appellant. The official receiver was right in rejecting the proof. The release is under seal and unconditional. The debt is therefore extinguished. It is true that the execution of the deed is itself the act of bankruptcy which has led to the adjudication, and that its effect has been to defeat the cessio bonorum which it contemplated, and to vest the estate by relation in the trustee in bankruptcy from the date of its execution, under s. 4 (sub-s. (*a*)) and s. 43 of the Bankruptcy Act, 1883. (1) But the release is still effectual.

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. (*a*): "A debtor commits an act of bankruptcy, if in England or elsewhere, he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally."

By s. 43: "The bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupts within three months next preceding the date of the presentation of the bankruptcy petition."

By s. 48, sub-s. 1: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same, is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

1888

IN RE STEPHENSON. EX PARTE OFFICIAL RECEIVER.

French v. *French* (1) and *Ex parte Bell, In re Webb* (2), are cases in which settlements of property which were void as against creditors, were held to be effectual for other purposes.

[CAVE, J.:—Those were cases of voluntary settlements. A voluntary settlement may be avoided by bankruptcy, but its execution is not an act of bankruptcy.]

A creditor who is a party to a deed of assignment containing a release cannot be a petitioning creditor in bankruptcy. He is estopped from treating the debt as subsisting, even after the deed has been set aside: *Small* v. *Marwood* (3); *Ex parte Stray, In re Stray.* (4) It would seem to follow, though there is no express authority to that effect, that a party to such a deed cannot be a creditor in bankruptcy at all.

[CAVE, J.:—Is not the case like fraudulent preference? A creditor who has accounted to the trustee for a sum received under a fraudulent preference, is surely not prevented from proving in bankruptcy.]

Such a creditor acquires the right under s. 48, sub-s. 1, of the Bankruptcy Act, 1883. The creditor who is a party to a void deed of assignment has no such right.

[He also cited *Doe* d. *Lloyd* v. *Powell* (5) and *Smith* v. *Dresser.* (6)]

Moulton, Q.C. (with him, *Stanger*), for the respondent. It has never yet been decided that a party to a composition deed which has been set aside is not entitled to prove in bankruptcy. This absence of authority is conclusive in the respondent's favour. Such a creditor may be estopped as regards petitioning before the deed has been declared void, but after it has been declared void he is entitled to prove. The release becomes a nullity and the debt revives.

[He cited *Doe* dem. *Pitcher* v. *Anderson* (7) and *Tappenden* v. *Burgess.* (8)]

Sir R. E. Webster, A.G., in reply.

CAVE, J. I am of opinion that this appeal should be dismissed. The question depends upon the intention of the parties.

(1) 6 De G. M. & G. 95.
(2) 1 G. & J. 282.
(3) 9 B. & C. 300.
(4) Law Rep. 2 Ch. 374.
(5) 5 B. & C. 308.
(6) Law Rep. 1 Eq. 651.
(7) 5 M. & S. 161.
(8) 4 East, 230.

The Court has to discover their intention, and has to give effect to the deed in accordance with their intention.

The object of the deed is to convey the estate of the debtor to a trustee for realization and division rateably among the creditors of the debtor. One of the covenants is to this effect: "In consideration of the premises the creditors parties hereto release the debtor from all claims and demands." The contention of the appellant is that though the conveyance and every other covenant in the deed is void owing to the debtor having been adjudicated bankrupt, this one covenant is valid, the debt due to the creditor is released, and he cannot prove in the bankruptcy. But there is not a single provision in the deed which in any way relates to bankruptcy. The object of the deed is to distribute the estate without bankruptcy proceedings, and to do so in just proportion among all the creditors of the debtor. It is not a case of a minority of creditors who are endeavouring to divide the whole estate among themselves to the exclusion of the majority, on the chance of their being able to effect this before a petition has been filed. Such a minority might perhaps actually intend to give up their right of proof, should the plan be discovered and the debtor be made a bankrupt. Here it is inconceivable that the appellant and the other creditors entertained any such intention. The arrangement which they were endeavouring to carry through was an arrangement which in no way contemplated the bankruptcy of the debtor, and they must have known that if the result was to be that no one who executed the deed could prove in case the arrangement miscarried and the debtor were made a bankrupt, there would be a great temptation to a few dissentients to defer executing the deed till nearly all the other creditors had done so, and then to make the debtor a bankrupt and have the estate administered for their own private benefit. It is, therefore, clear that the release was not intended to be operative in case of bankruptcy.

In the case of fraudulent preference the creditor can seldom intend that the acceptance of a payment by way of fraudulent preference shall be a valid release to the debtor, such as, if the payment is set aside, to disentitle the creditor to prove in bankruptcy. This case is similar. The intention of the parties was

1888

IN RE STEPHENSON. EX PARTE OFFICIAL RECEIVER.

that the release was to stand or fall with the rest of the deed, and the whole consideration for it having failed, the appellant is entitled to prove. The decision of the learned judge was therefore correct.

GRANTHAM, J. I am of the same opinion. No authority either for or against the contention of the appellant has been cited by counsel. The reason is that, though composition deeds in this form have been common for many years and have always been liable to be set aside in case of bankruptcy, it has never till now been suggested that when bankruptcy has taken place, and the consideration for which the creditor gave his assent to the composition has, therefore, totally failed, the debt due is nevertheless extinguished. There could be no authority for so singular a proposition.

Solicitor for appellant: *Solicitor to the Board of Trade.*

Solicitors for respondent: *Ockerby & Everington, for J. & A. Bright, Nottingham.*

H. D. W.

Jan. 23.

IN RE STANIAR, ROBERTS, & CO. EX PARTE SMITH (TRUSTEE) AND ANOTHER.

Bankruptcy—Scheme of Arrangement—Approval of Court—Sale of Assets without the Jurisdiction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 6.

The debtors were merchants having a house in England and a house in South America. Assets of large amount, forming the principal part of the estate, were in South America without the jurisdiction. A scheme was proposed for the sale of these assets to one of the partners who resided in South America for about their estimated value, such partner agreeing to pay the purchase-money by quarterly instalments extending over four years. Under the scheme the trustee was to insure the purchaser's life for about one-sixth of the amount payable, but there was no other provision as to security. The scheme was recommended by the committee of inspection, who were creditors for a large amount, and by an accountant who, at their instance, had gone to South America and examined the affairs of the house there. The official receiver also made a report in favour of what was proposed. The county court judge refused to approve of the scheme:—

Held, that the judge had exercised his discretion wrongly, and that the scheme ought to be approved by the Court as being reasonable and for the benefit of the general body of the creditors.

APPEAL against a decision of the judge of the Manchester County Court refusing to approve a scheme of arrangement of

1888

IN RE STANIAR, ROBERTS & CO. EX PARTE SMITH.

the affairs of the debtors which had been confirmed by a statutable majority of creditors.

The debtors were merchants carrying on business in Manchester and Chili, their principal trade being the exportation of English goods to South America for sale. The unsecured liabilities were estimated at 63,000*l.*, or at 83,000*l.*, if certain alleged hypothecations to creditors of goods or proceeds in South America as security for advances were valid. The assets in Manchester were valued at about 5000*l.*, those in South America at about 50,000*l.*

The scheme, which it was considered would, with the Manchester assets, produce a dividend payable to the unsecured creditors of 12*s.* 6*d.* in the pound, was to the effect: (1.) that the South American assets should be sold by the trustee to Mr. Hodgkinson, one of the Chilian partners, for 58,000*l.*, payable in four years by quarterly instalments; (2.) that the trustee and the committee of inspection should have an absolute discretion to decide as they thought proper all claims by creditors to liens or security, whether by payment in full or otherwise; (3.) that the payment of the purchase-money was to be guaranteed by a policy on Mr. Hodgkinson's life for 10,000*l.*

The scheme was proposed by the appellants, the trustee, and Mr. Hodgkinson. It was supported by the committee of inspection, which consisted of persons of good commercial standing in Manchester, creditors to the extent of 50,000*l.*, and by an accountant, who had examined the affairs of the Chilian house, and who reported that according to Chilian law it would be impossible to create any valid mortgage or charge on the South American assets in favour of the trustee.

The respondents, the objectors to the scheme, were Messrs. Samuel & Isaac, of Manchester, creditors for 7000*l.*, for 4000*l.* of which they contended that they held security in South America. They did not object at the creditors' meetings, but before the judge stress was laid on their behalf on the complete surrender of the foreign assets which the scheme involved, and on the absence of adequate security for the payment of the purchase-money. They also charged the Chilian partners with failure to remit the proceeds of goods hypothecated to them as security for

1888

IN RE STANIAR, ROBERTS & CO. EX PARTE SMITH.

advances. The accountant stated that according to the books of the Chilian house the Manchester house usually provided the respondents with funds to meet their acceptances on shipments, and that owing to the business in Chili being a retail trade, carried on at great distances in that country and Bolivia, the Chilian house could not be expected to ear-mark proceeds.

The official receiver reported that having regard to the nature and situation of the assets affected, and the report as to Chilian law, he thought the proposal reasonable and calculated to benefit the majority of the creditors, but left it to the Court to decide whether the policy for 10,000*l.* on the life of Mr. Hodgkinson was sufficient guarantee for the payments to be made under the scheme.

The judge was of opinion that the proposal did not satisfy s. 18, sub-s. 6 (1), of the Bankruptcy Act, 1883, and refused to approve the scheme.

Sir C. Russell, Q.C. (*Henn Collins, Q.C.*, and *G. W. Lawrence*, with him), for the appellants. The scheme should have been approved. The judge was misled by an imputation on the Chilian house which is shewn to have been untrue by the accountant. No doubt the success of the scheme must depend on the honesty and capacity of the Chilian partner; but the trustee and the committee are satisfied, and they are well qualified to judge. The creditors who recommend the scheme have not shewn carelessness. A skilled and impartial person who has examined on their account the affairs of the Chilian house is in favour of the sale. There is no rule or practice as to the nature or amount of security to be given in such cases, and, having regard to the evidence as to Chilian law, there is nothing to shew that any security better than that proposed is available.

No alternative scheme is before the Court, and unless the scheme is adopted it will be impossible to realise the foreign assets except at a great expense.

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 18, sub-s. 6: "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors . . . the Court may in its discretion refuse to approve the composition or scheme."

[He cited *Ex parte Campbell, In re Wallace* (1); *Ex parte Reed, In re Reed* (2); *Ex parte Kearsley, In re Genese.* (3)]

Bigham, Q.C. (*S. Woolf*, with him), for the respondents. The scheme has been rejected by the judge in the proper exercise of his discretion. The security is inadequate.

[CAVE, J. Is there any person known to the respondents who might be expected to become surety for Mr. Hodgkinson?]

The respondents do not know of anyone, but the life policy is a poor security, and it is unreasonable to part with so much of the estate on such terms. The scheme is also unfair to secured creditors, which the respondents claim to be, from the absolute power over their securities with which it invests the trustee and committee of inspection to the exclusion of the Court.

The case is one in which the assenting majority of creditors might well be required to guarantee the payment of a dividend to the dissenting minority.

Muir Mackenzie, for the official receiver, was not heard.

CAVE, J. I am of opinion that this appeal should be allowed. The approval of a scheme of arrangement is no doubt a matter for the discretion of the Court, and I am not disposed to interfere, unless I think, as I do in this case, that the Court has not proceeded upon right principles.

The case is peculiar. The assets are nearly all in Chili, out of the jurisdiction of the Court, and the collection of them by the trustee would be most expensive, and might result in a very small dividend or in no dividend at all. Under these circumstances one of the Chilian partners offers to buy the Chilian assets for a sum representing about their estimated value, the purchase-money to be payable in sixteen instalments within four years. The committee of inspection, composed as it is of competent men of business, who are acting on the report of an experienced accountant whom they have sent to Chili to examine the affairs of the Chilian house, are in favour of the sale. The trustee proposes the scheme, and the official receiver, as the representative of the Board of Trade, approves it as reasonable and for

(1) 15 Q. B. D. 213. (2) 16 Q. B. D. 244.
(3) 18 Q. B. D. 168.

1888

IN RE STANIAR, ROBERTS & Co. EX PARTE SMITH.

Cave, J.

the general benefit of the creditors. It is an obvious feature of the scheme that it contains no provision whatever by way of guarantee, but depends solely for its success on the honesty and capacity of Mr. Hodgkinson. This feature of the scheme, the committee, who are creditors of the firm for a large amount, and who have had opportunities of forming a just estimate of Mr. Hodgkinson's character, perfectly well understood when they gave it their sanction.

The refusal of the learned judge to approve the scheme seems to have been due partly to imputations on Mr. Hodgkinson's conduct, which were unfortunately made at the hearing, and which have now been shewn to be baseless, partly to the feature of the scheme to which I have alluded, the absence of any guarantee. It is said that this is a matter with respect to which the judge was entitled to exercise an absolute discretion; but I cannot assent to this. If the judge supposed that no scheme of arrangement, involving a sale of assets difficult to collect can ever be approved by this Court unless the payment of the purchase-money is to some extent guaranteed, his view was, in my opinion, erroneous. There is and ought to be no such general doctrine. If Mr. Hodgkinson were proved to have wealthy friends, there would be more force in the contention that he ought to find a surety, but this is not proved. As to the suggestion that the payment of the claims of the creditors who disapprove of the scheme should be guaranteed by the creditors who approve of it, nothing can be more unreasonable.

The scheme, then, may be expected to turn out well if Mr. Hodgkinson proves honest and capable, but not otherwise. The majority of the creditors, who are well qualified to judge, believe Mr. Hodgkinson to be both honest and capable, and there is nothing before the Court to shew that they are mistaken in their opinion, or that the scheme is otherwise than reasonable and for the general benefit of the creditors. The scheme ought therefore to be allowed.

GRANTHAM, J. I am of the same opinion. No doubt caution is very desirable as regards the approval of schemes of composition and arrangement, but want of security is not of itself a

sufficient reason for rejecting a scheme of this nature. The question is commercial rather than legal, and a scheme approved by such a committee and sanctioned by the Board of Trade ought not to be rejected without some very adequate reason.

Appeal allowed.

Solicitors for appellants: *Grundy, Kershaw, Saxon, & Samson.*
Solicitor for respondents: *H. Montagu.*
Solicitor for official receiver: *Solicitor to Board of Trade.*

H. D. W.

THE QUEEN *v.* THE COMMISSIONERS FOR SPECIAL PURPOSES OF THE INCOME TAX.

Jan. 27, 29, 31.

Revenue—Income Tax—Repayment of Income Tax—Computation of Profits—"Shall find and shall prove within or at the end of the year" of Assessment—5 & 6 Vict. c. 35, *s.* 133—23 *Vict. c.* 14, *s.* 10.

By 5 & 6 Vict. c. 35, s. 133, income tax assessed under Schedule D is to be repaid "if" the person assessed "within or at the end of the year" of assessment "shall find and shall prove to the satisfaction of the Commissioners by whom the assessment was made" that his profits during the year for which the computation was made fell short of the sum at which they were assessed.

By s. 10 of 23 Vict. c. 14, no claim for repayment of income tax is to be allowed unless made within three years of the year of assessment to which it relates.

In March, 1887, the appellants made a claim for repayment of income tax assessed on profits for the years ending April, 1884, April, 1885, and April, 1886. They did not shew that it was more difficult to "discover and prove" diminution of profits as regards the years ending April, 1884, and April, 1885, than as regards the year ending April, 1886:—

Held, by CAVE, J., that s. 10 of 23 Vict. c. 14, did not apply, that under s. 133 of 5 & 6 Vict. c. 35, the appellants were bound to use reasonable diligence to "discover and prove" diminution of profits "within or at the end of the years" of assessment in question, and that, as the circumstances of the case did not shew that they had used such reasonable diligence, they were not entitled to any repayment in respect of the income tax for the years 1884 and 1885.

By GRANTHAM, J., that s. 10 of 23 Vict. c. 14, applied, and that the appellants having made their claim within three years of the two years in question, were entitled to repayment in respect of the income tax for such two years respectively.

RULE nisi calling upon the Commissioners for Special Purposes of the Income Tax to shew cause why a mandamus should not issue commanding them to order repayment to the Cape Copper

1888

THE QUEEN v. COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX.

Mining Company, Limited, of certain overpaid income tax pursuant to 5 & 6 Vict. c. 35, s. 133.

In March, 1887, the company applied to the Income Tax Commissioners for the city of London for certificates entitling them to repayment of income tax alleged to have been overpaid in the years of assessment ending respectively April 5, 1884, April 5, 1885, and April 5, 1886. The Income Tax Commissioners for the city of London inquired into the claim and granted a a certificate for each year. On the case coming before the Commissioners for Special Purposes of the Income Tax they allowed the claim for 1886, but disallowed the claims for 1884 and 1885.

The secretary of the company deposed that he computed the profits of the company's business for each of the years in question on an average of the preceding three years, but that "upon a subsequent examination and comparison" he discovered the diminution in respect of which the claim was made. The affidavit did not state as regards 1884 and 1885 at what dates, and as the result of what amount of examination and calculation, the diminution had been discovered.

It appeared to be the practice of the Commissioners for Special Purposes to refuse claims for repayment of income tax in respect of profits unless made within a year from the end of the year of assessment to which they related.

Sir R. E. Webster, A.G. (with him *Sir E. Clarke, S.G.*, and *A. V. Dicey*), for the Commissioners, shewed cause. The company are not entitled to repayment of income tax under s. 133 of 5 & 6 Vict. c. 35. (1) The claim is in respect of the assessment years ending in April, 1884 and 1885, and it was not made till March, 1887. In neither case has there been discovery and proof "at the end of the year" for which the profits were erroneously assessed. The words "at the end of the year" cannot mean "at any time after the end of the year."

Sect. 10 of 23 Vict. c. 14 (1), does not apply. This section

(1) By s. 133 of 5 & 6 Vict. c. 35: "If within or at the end of the year current at the time of making any assessment under this Act, or at the end of any year when such assessment ought to have been made, any person charged to the duties contained in Schedule D, whether he shall have computed his profits or gains . . . on the amount thereof in the preceding

does not extend the time for discovery and proof under s. 133 of the principal Act, but limits the time within which a person qualified by proper discovery and proof under s. 133 can enforce his claim to three years from the expiration of the year of assessment.

F. Meadows White, Q.C., and *Pollard*, in support of the rule. The company are entitled to repayment in respect of both years. The words "at the end of the year" of assessment in s. 133 of the principal Act are the equivalent of "at any time after the expiration of the year of assessment" in s. 61. Where a definite time is intended the Act is specific, as in s. 134, where the limitation is "within three months." The effect of s. 10 of 23 Vict. c. 14, is to confine all claims to three years from the end of the assessment year. This is the only statutory restriction imposed on the right to repayment, and the claim of the applicants has in each case been made within three years from the end of the assessment year.

GRANTHAM, J. I am of opinion that this rule should be made absolute. The question turns chiefly on the construction of s. 133 of 5 & 6 Vict. c. 35. The section enacts that an assessed person can demand a return of income tax overpaid on profits "if within or at the end of the year current at the time of making the assessment he shall find and shall prove to the satisfaction of the commissioners that his profits and gains during such year fell short" of the sum at which he estimated them. Now in 1842,

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or current year, or on an average of years, shall find, and shall prove to the satisfaction of the Commissioners by whom the assessment was made, that his profits and gains during such year for which the computation was made fell short of the sum so computed in respect of the same source of profit on which the calculation was made, it shall be lawful for the said Commissioners to cause the assessment made for such current year to be amended in respect of such source of profit, as the case shall require, and, in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for Special Purposes . . . . the amount of the sum overpaid upon such first assessment, and thereupon the last-mentioned Commissioners shall issue an order for the repayment of such sum as shall have been so overpaid."

By s. 10 of 23 Vict. c. 14: "No claim for repayment of duty under this Act or any former Act relating to the income tax shall be allowed unless it shall be made within three years next after the end of the year of assessment to which the claim shall relate."

1888

THE QUEEN v. COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX.

Grantham, J.

when this Act passed, the computation of the profits of a mercantile firm trading with distant parts of the world was a matter of greater difficulty than it is in these days of easier communication. It was, therefore, essential that time should be allowed for the computation of profits, if it was to be made honestly. The effect of allowing too short a time must have been to tempt mercantile firms to under-estimate their profits in order to avoid the new tax. I can scarcely believe that this danger was not present to the mind of the legislature in 1842, and I think that this danger would almost certainly result if the narrow construction which has been suggested were put upon the words "shall find and shall prove at the end of the year." When the Act passed it must have been practically impossible for a great firm to calculate their profits, so as to be in a position to support a claim for repayment during or immediately after the year of assessment. For this reason I do not think that this is the meaning of the words.

What, then, is their meaning? In my opinion in construing them it is necessary to separate "find" from "prove" and to confine the words of limitation to the process of discovery. The section, it appears to me, contemplates the discovery of a mistake in the profits when all the transactions for the year of assessment are over, and so far as it is concerned, allows such a mistake to be proved at any time. This liberty is, however, in my opinion cut down by s. 10 of 23 Vict. c. 14, an Act passed after the operation of the tax had become well understood. The result is that an applicant is confined to three years from the end of the year of assessment. If this view is correct, the company are in time, as their claim relates to April, 1884 and April, 1885, and was made in March, 1887. They are therefore entitled to repayment. As, however, my brother Cave does not agree with this conclusion, and the Court is thus equally divided, I withdraw my judgment.

CAVE, J. I have the misfortune to differ from my learned Brother. The question is as to the meaning of the words "at the end of the year" of assessment in s. 133 of 5 & 6 Vict. c. 35. It is said on the one side that they mean "at any time after the end of the year" of assessment, on the other that they mean in some real sense "at the end of the year" of assessment.

Now, in this Act and the subsequent Act 16 & 17 Vict. c. 34, taken together, the time for claims is dealt with in five other cases. In three cases, ss. 61 and 105 of this, and s. 54 of the later Act, no time is limited. Either the statute is silent or it says "at any time" after some event which it names. On the other hand, in two cases, s. 134 of this and s. 18 of the later Act, a definite limit, in the one case of three months in the other of six months, is fixed. This difference shews, as it appears to me, that the legislature was careful in this matter of limitation and intentionally fixed or did not fix a definite time. I therefore conclude that "at the end of the year" of assessment means in some real sense "at the end of the year" of assessment.

The context is "shall find and shall prove." What is the meaning of "shall find and shall prove at the end of the year" of assessment? My opinion is that the words are designedly rather indefinite. It was not thought desirable to fix a precise time for discovery and proof. The mistake in the profits might be obvious, or might be impossible to discover and prove without a great deal of examination and calculation. What the legislature intends is that the mistake is to be found and proved "at the end of the year" by the exercise of reasonable diligence on the part of the applicant. He is to act not to sleep upon his right under the statute.

Upon this interpretation of the words have the applicants shewn reasonable diligence as regards discovery and proof? I am of opinion that they have not shewn reasonable diligence. They found it possible to prepare their case as regards the year ending April, 1886, as early as March, 1887. But as regards the year ending April, 1884, they claim nearly three years, as regards the year ending April, 1885, they claim nearly two years after its expiration. What explanation do they offer? The affidavit of their secretary merely says in the most general terms that he discovered the mistakes "upon a subsequent examination of the account." This is, as it appears to me, no explanation at all. I think, therefore, that due diligence has not been shewn, and that for this reason the applicants are not entitled to repayment under the statute.

I should add that in my opinion s. 10 of 23 Vict. c. 14, does

1888

THE QUEEN v. COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX.

not apply. That section refers to both the unlimited and the limited periods, and while it shortens the former does not lengthen the latter.

I think, therefore, that the rule should be discharged, and as my learned Brother withdraws his judgment, this will be the effect of our decision.

Rule discharged.

Solicitors: *J. Sheppard*; *Solicitor to the Inland Revenue.*

H. D. W.

Feb. 2.

PRIM *v.* SMITH.

Mayor's Court of London—Practice—Certiorari—Time for lodging Writ with Officer of Mayor's Court—Mayor's Court of London Procedure Act, 1857 (20 *&* 21 *Vict. c. clvii.*), *ss.* 16, 17, 19—*Borough and Local Courts of Record Act*, 1872 (35 *&* 36 *Vict. c.* 86), *Schedule*, *r.* 12.

By the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 17, "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior court, unless the writ removing such cause shall have been lodged with the proper officer of the court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court."

The defendant applied for an order for the removal of a cause depending in the Mayor's Court by certiorari into the High Court more than one month after the service of the plaint, but before the action had been entered for trial in the Mayor's Court:—

Held, by Mathew, J., that the cause not having been entered for trial in the Mayor's Court when the application was made, the application was made in time according to the section:—

Held, by A. L. Smith, J., that the application, not having been made within one month after the service of the plaint in the Mayor's Court, was not made in time according to the section.

APPEAL from the order of a master at chambers for the issue of a writ of certiorari removing the cause from the Mayor's Court of London into the High Court. The action was brought to recover damages laid at more than 50*l*. The plaint was served on November 26, 1887. The order for the issue of the writ of certiorari was made on January 24, 1888, before the cause had been entered for trial in the Mayor's Court.

It was contended before Field, J., on appeal from the master,

that the cause could no longer be removed as the application had not been made within one month from the service of the plaint in accordance with s. 17 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.). Field, J., referred the matter to the Court.

Horne Payne, Q.C. (*Colam* with him). The order is invalid. The jurisdiction depends on s. 17 of the Mayor's Court of London Procedure Act, 1857. (1) By this section no cause can be removed from the Mayor's Court into the Superior court at the instance of a defendant, except on fulfilment of two conditions, the lodging

(1) By the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 17: "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior court, unless the writ removing such cause shall have been lodged with the proper officer of the court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court."

By s. 16: "No cause depending in the Mayor's Court in which the debt or damages sought to be recovered shall not exceed 50*l.*, shall be removed by any defendant before judgment therein into any superior court, except in pursuance of a judge's order as hereinafter mentioned, unless the defendant with two sufficient sureties, such as the Mayor's Court shall allow, shall first be bound to the plaintiff in the cause by recognizance, to be acknowledged in the Mayor's Court, in a sufficient sum for the payment of the debt or damages and costs, in case judgment shall pass against the defendant in the superior court, or in case the cause shall be brought back by procedendo in the Mayor's Court: Provided always, that any judge of any of the superior Courts may, in the exercise of his discretion order a writ of certiorari to issue, removing any such cause depending in the Mayor's Court into any superior court, without such recognizance as aforesaid, and such cause may be removed into such superior court accordingly."

By s. 19: "No cause depending in the Court shall, before judgment be recovered, be removable into any of the superior courts (after plea pleaded), unless by leave of a judge of one of the said superior Courts, in cases which shall appear to such judge fit to be tried in one of the superior courts, and upon such terms (if any) as to payment of costs, giving security for debt and costs, or such other terms as he shall think fit, upon summons."

By the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), schedule, rule 12: "No action entered in the court" (i.e., among others the Mayor's Court), shall before judgment be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior Courts in cases which shall appear to such judge fit to be tried in one of the superior courts, and upon such terms, as to payment of costs, security for debt and costs, or such other terms, as such judge shall think fit."

1888

PRIM v. SMITH.

of the writ of certiorari with the officer of the Mayor's Court within a month of the service of the plaint in that court, and the lodging of the writ of certiorari with such officer before the cause has been entered for trial in that court. In the section "or" is used not in a disjunctive but in a conjunctive sense, and is equivalent to "and." In *Metropolitan Board of Works* v. *Steed* (1), Grove, J., explains that "or" is thus used in statutes. The effect is that a writ of certiorari addressed to the officer of the Mayor's Court has no effect if served more than a month after the service of the plaint or after the entry of the cause for trial if it is entered in less than a month from the service of the plaint. Here the writ was served more than a month after the service of the plaint.

R. M. Bray, for the defendant. The order having been made before the entry of the cause for trial, was in time under s. 17 of the Mayor's Court of London Procedure Act, 1857 (2). The section should be interpreted according to its grammatical construction. "Or" is disjunctive. Rule 12 in the schedule to the Borough and Local Courts of Record Act, 1872 (2) applies to the Lord Mayor's Court and appears to contemplate removal by certiorari at any time before judgment.

A. L. SMITH, J. I regret that there should be a difference of opinion in the Court to which this question has been referred by my brother Field. I cannot, however, agree with my learned Brother as to the interpretation to be put upon s. 17 of the Mayor's Court of London Procedure Act, 1857. The effect of ss. 16 and 19 of this Act and of rule 12 in the schedule to the Borough and Local Courts of Record Act, 1872, is, as it seems to me, that, where the sum for which the action is brought in the Mayor's Court is under 50*l.*, a writ of certiorari can only issue by judge's order, but where such sum is 50*l.* or more, then, till he has pleaded in the Mayor's Court, the defendant can claim the issue of the writ as of right, but, if he has pleaded in the Mayor's Court, he must obtain a judge's order. In these provisions there is nothing as to the time for applying for the writ in the High Court or for serving it on the officer of the Mayor's Court.

(1) 8 Q. B. D. 445.

(2) See ante, p. 555.

Sect. 17, in my opinion, assigns one month from the service of the plaint as the maximum time allowed for the service of the writ on the officer of the Mayor's Court, but reduces this limit to the time of the entry of the cause for trial, should it be entered for trial less than a month from the service of the plaint. It must be remembered that the other view of the section gives the defendant six years in which to serve the writ on the officer of the Mayor's Court.

MATHEW, J. This section of the Mayor's Court of London Procedure Act, 1857, is not easy to interpret; but I scarcely think the legislature can have intended that one month from the service of the plaint in the Mayor's Court should be the absolute limit of the time during which a judge can exercise his discretion as to the removal of a cause into the High Court by certiorari, however great the importance of the cause, and however obvious the propriety of the application for its removal. Two other sections of this Act relate to the exercise of this discretion. Sect. 16 refers to applications for the removal of actions for an amount not exceeding 50*l.*, s. 19 refers to applications for the removal of actions for larger amounts. The only words relating to time in these sections are in the former section "before judgment," in the latter "after plea pleaded," both indefinite expressions. These sections do not appear to contemplate that the judge of the High Court shall only be at liberty to exercise his discretion within a very short time from the commencement of the action in the inferior court. The section which we have to construe, s. 17, names two limits, "a month after service of the plaint," and, in the alternative, as I read it, "any time before the cause has been entered for trial." The order appealed against, having been made before the cause was entered for trial, was made within the second limit, and was therefore, in my opinion, made in time. The other interpretation confines the operation of the second limit to cases in which the cause is entered for trial less than a month after the service of the plaint. A case of importance would seldom be entered for trial within so short a time. I feel, however, the full force of what my brother Smith has said in favour of this interpretation.

In consequence of our inability to agree, the appeal will be

1888

PRIM v. SMITH.

dismissed. We give leave to appeal. Should there be no appeal, the application will be referred back to my brother Field for consideration on its merits.

Appeal dismissed.

Solicitors for plaintiff: *Ranger & Burton.*
Solicitor for defendant: *Tarn.*

H. D. W.

Jan. 31.

HOWARD *v.* CLARKE.

Pawnbroker—Detention of Person offering Article to pawn—Reasonable Suspicion that Article was stolen—Pawnbrokers Act, 1872 (35 *&* 36 *Vict. c.* 93), *s.* 34.

By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34, in any case where, on an article being offered in pawn to a pawnbroker he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, he may seize and detain the person so offering the article and the article, or either of them, and shall deliver the person and the article, or either of them (as the case may be) as soon as may be into the custody of a constable.

The plaintiff offered in pawn to the defendant, a pawnbroker, a gold horse-shoe pin, set with seven diamonds, and a ring. The defendant, having previously received from the police a notice of articles recently stolen, amongst which was "a gold horse-shoe pin, set with seven diamonds," and a ring, asked the plaintiff if he was a dealer. He replied that he was not. The defendant also asked the plaintiff where he obtained the articles. The plaintiff said that he got them from a publican, whose name and address he stated. The defendant gave the plaintiff into custody of a constable. It was afterwards proved that the articles in the possession of the plaintiff had not been stolen, and that his statements were true. In an action by him for false imprisonment the judge left the question whether the defendant had a reasonable suspicion to the jury, who found their verdict for the plaintiff:—

Held, that the question arising under the Act whether the defendant reasonably suspected that the pin had been stolen or otherwise illegally or clandestinely obtained was for the judge; that, on the facts, there was no evidence of absence of reasonable suspicion in the mind of the defendant, and therefore judgment should be entered for him.

APPEAL from Nottingham County Court.

Action for false imprisonment. At the trial of the action it appeared that the plaintiff went to the shop of the defendant, a pawnbroker, and offered in pawn to him for 12*l.* a large gold horse-shoe pin, set with seven diamonds, and also a ring with one diamond in it. The defendant had received from the police a printed notice of a burglary committed in the neighbourhood a few days

previously, with a list of articles stolen, amongst which were "a gold horse-shoe pin, set with seven diamonds, massive," and a "gold ring set with three diamonds, large one in the centre, very heavy."

The defendant asked the plaintiff where he got them, or whose property they were, and the plaintiff said from Tom Noble of the "Three Tuns;" the defendant also asked the plaintiff if he was a dealer, and he said no. After comparing the pin with the description of the pin in the notice, and consulting with his son, the defendant sent for a constable, and gave the plaintiff into custody. He was taken to the police station, and Noble, a publican, living not more than three or four minutes' walk from the pawnbroker's shop, appeared, and stated that he had sent the plaintiff to pawn the articles for the owner, a person whose name was given. The pin was shewn to the person who had been robbed, and it was found that it was not that which had been stolen from him. The plaintiff was then released.

It was contended at the close of the plaintiff's case that there was no proof of a want of reasonable and probable cause, and that the defendant had a reasonable suspicion within the Pawnbrokers Act, 1872. The county court judge was of opinion that the Act did not impose on the judge the duty of deciding whether the defendant had a reasonable suspicion, and therefore that it was a question for the jury, and he had no right to withdraw it from them.

The jury found a verdict for the plaintiff for 25*l.* damages.

A. Channell, Q.C. (*Hextall*, with him), for the defendant. By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34, in any case where, on an article being offered in pawn to a pawnbroker, he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, the pawnbroker may seize and detain the person and the article, or either of them, and shall deliver the person and the article, or either of them (as the case may be) as soon as may be into the custody of a constable . . . ."

The defendant, believing that the pin was that described in the notice, reasonably suspected that the article offered to him had been stolen, and therefore was bound to detain the plaintiff.

1888

HOWARD v. CLARKE.

The object of the Act would be defeated if the pawnbroker must go out to inquire into the truth of statements made to him before he can detain the person offering things in pawn. There was no evidence that the defendant did not reasonably suspect that the pin had been stolen, and the county court judge was wrong in leaving the case to the jury, for, by analogy to the law of malicious prosecution and false imprisonment, the question of reasonable suspicion is one for the judge to decide. But even if it were for the jury, there was no evidence which should have been submitted to them.

Stanger, for the plaintiff. The question of reasonable suspicion was for the jury to decide, and there was evidence to be left to them. The defendant might easily have made inquiries of the publican to verify the statements of the plaintiff before arresting him. The Act confers large powers on pawnbrokers, and they must exercise them with care. If the pawnbroker reasonably suspects that the article has been stolen, or otherwise illegally or clandestinely obtained—that is to say, by the person offering it in pawn—he may detain such person and the article, or either of them, and shall deliver the person and the article, or either of them "(as the case may be)" to a constable. The defendant might and should have kept the pin only, and not the plaintiff. If the pawnbroker suspects the person to have stolen the article he may be detained; if the pawnbroker suspects that he obtained it clandestinely the article only should be detained, and not the person.

Channell, Q.C., replied.

MATHEW, J. I am of opinion that this appeal must be allowed and judgment must be entered for the defendant. We have to interpret the Pawnbrokers Act, 1872, 35 & 36 Vict. c. 93. Sect. 34 enacts that "If any person does any of the following things, (1) offers to a pawnbroker an article by way of pawn, being unable or refusing to give a satisfactory account of the means by which he became possessed of the article . . ." he shall be guilty of an offence; so that if he produces an article to pawn he is placed in the position of having to give a satisfactory account of it. To whom? Clearly to the pawnbroker. "In every such case," that is in the three cases specified in the first

part of the section, "and also in any case where, on an article being offered in pawn to a pawnbroker he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, the pawnbroker may seize and detain the person and the article, or either of them, and shall deliver the person and the article, or either of them (as the case may be) as soon as may be into the custody of a constable." The Act was undoubtedly framed because it was notorious that goods improperly obtained would be most likely to be taken to a pawnbroker's shop, and therefore the pawnbroker, in furtherance of justice, is enabled to detain the person bringing the article, and the article; the condition on which the pawnbroker may detain them is if he has reasonable cause to suspect that the article is illegally or clandestinely obtained. I do not agree with the learned counsel who said that the words "by the person offering" the article should be read into the section. It seems to me that they are carefully left out. The first question in this case is an abstract one, viz., who is to decide whether there was reasonable evidence of the absence of reasonable suspicion? It has been argued on one side, that it is for the jury, and on the other, that it is for the judge. My impression is that it is for the judge, as in the closely analogous case of malicious prosecution. But whether for the judge or for the jury it is for us in the present case to say whether there was any evidence on which a judge, if the matter is for him, or a jury, if the matter is for them, could act, to shew there was reasonable suspicion. That depends on the facts. A person, not in the least likely to be the owner of it, brought a diamond pin with seven stones in it—and, as I should have described it, a massive pin—to a pawnbroker's shop. The pawnbroker had previously received from the police a notice in order that he might act on it in accordance with the provisions of the statute. The notice was of a recent burglary, and that amongst the articles stolen was a massive diamond pin containing seven stones. There is a conflict of evidence as to what inquiries were made. The fact was that the pin had been entrusted to the plaintiff by a publican, and, had an explanation been asked for by the pawnbroker, he would have been told that the pin had been received from a publican, a person not likely to possess or wear an article

1888

HOWARD v. CLARKE.

Mathew, J.

of this description. It now appears that it was not the publican's, but the property of a person in needy circumstances who entrusted it to him to pledge, and the publican handed it to the plaintiff, who took it, without any improper intention, to the pawnbroker. The pawnbroker was not satisfied, and, believing that the pin was the one described in the notice, he did exactly what the Act prescribes and sent for the police, who took the plaintiff to the police office. There is abundant evidence that the pawnbroker honestly believed this to be the pin described in the notice, and the description is so close that when the pin was produced to the real owner he thought at first that it was the pin stolen. Where is the evidence of absence of reasonable suspicion in the pawnbroker's mind? It is said first that he ought not to have acted at all, secondly, that he might have detained the pin, but that he ought not to have detained the plaintiff. Why not? The police came, inquiries were made, and it appeared that the pin had been entrusted to the plaintiff by a publican. It is contended that the pawnbroker ought to have gone to the publican. But that is not what the Act directs. The Act requires the pawnbroker, if he entertains an honest suspicion at the time of tender, to detain the article and the person. I think there was no evidence of the absence of reasonable suspicion, which is indispensable to the plaintiff's case. If the learned counsel for the plaintiff were right in his interpretation of the Act the pawnbroker would be in a worse position with the Act than without it, because, before a person can be made responsible in an action for malicious prosecution, it must be proved not only that he had no reasonable and probable cause, but that he was actuated by malice and was influenced by some other motive than an honest belief of guilt. I think the question is for the judge, and, treating it as a question of fact for the judge, that there was no evidence on which he could have found against the defendant.

A. L. SMITH, J. I am of the same opinion. At the trial of this action the point was raised either that there was no evidence of the absence of reasonable suspicion, or that the pawnbroker had reasonable suspicion. Was the question for the judge or for the jury? I think it was for the judge. It is conceded that in

actions for malicious prosecution and false imprisonment the question as to absence of reasonable and probable cause is for the judge. In *Thompson* v. *Farrer* (1), Brett, L.J., said: "The question of reasonable and probable cause, if material, is never a question for the judge except in the cases of a charge of malicious prosecution or false imprisonment." I do not think it makes much difference in the present case whether the question was for the judge or for the jury. The evidence was this: a felony had been committed in the neighbourhood, and a police notice had been sent out to all pawnbrokers that a house had been broken into and numerous articles stolen, and amongst them a gold horseshoe pin with seven stones, massive. The burglary was on August 28, and on September 9, the plaintiff being an absolute stranger to the pawnbroker, came into the shop and offered in pawn a pin. I am entitled to use the evidence of my own eyes, and I have no hesitation in saying that the gold pin exactly fitted the notice given by the police. The pawnbroker had this notice from the police, and under the sections of the Act from s. 33 to s. 36 it is his duty to act under certain circumstances. A man came, the pawnbroker asked if he was a dealer, and he said that he was not. The pawnbroker discussed the matter with his son and came to the conclusion that this pin was the pin mentioned in the notice, and he did that which I think he was bound to do, having a suspicion—and I think a reasonable suspicion—that it was the stolen pin, viz., detained the pin and the man. If the case stopped there surely every one would say that the pawnbroker had reasonable suspicion. But it is said there was evidence to shew that he had not reasonable suspicion, because when the plaintiff was asked he said he got the pin from Noble, a publican living some five minutes' walk away, and the pawnbroker did not go to Noble. But the moment of reasonable suspicion under the statute is the moment when the article is offered in pawn. Suppose the pawnbroker had gone down the street to inquire of Noble whether the account given of the pin was true or false, that would have been some evidence that the pawnbroker did not suspect the pin to be stolen. I think the question was, whether at the time the plaintiff produced the pin to the pawn-

(1) 9 Q. B. D. 372, at p. 382.

1888

HOWARD v. CLARKE.

broker the evidence shewed that he had or had not reasonable suspicion. I come to the conclusion, on the evidence, that he had, and there was no evidence to negative it. The county court judge ought to have ruled that there was no evidence of reasonable suspicion, and to have nonsuited the plaintiff.

Judgment set aside. Leave to appeal granted.

Solicitors for plaintiff: *Clinton & Buckley.*
Solicitors for defendant: *Page & Scorer.*

J. R.

Feb. 1.

[IN THE COURT OF APPEAL.]

JONAS *v.* LONG AND ANOTHER.

County Court—Appeal—Interlocutory Order—Equitable Jurisdiction—County Courts Act, 1865 (28 *&* 29 *Vict. c.* 99).

An appeal lies from an order made in an interlocutory proceeding, by a judge of a county court, by virtue of the equitable jurisdiction conferred by the County Courts Act, 1865.

THIS was an action brought in the county court for the winding-up of a partnership. The plaintiff was appointed by the Court receiver, and on his application and after hearing the parties the judge ordered that the defendant Harris should pay into court within fourteen days from the date of the order a sum of money found to be money belonging to the partnership, and admitted to be in his hands, and to deliver up certain specified books and documents. This order was not complied with, and a further order was made, reciting that the Court was of opinion that the defendant Harris, in his fiduciary capacity as manager of the partnership, had been guilty of a contempt of Court by neglecting to obey the previous order, and directing that he should stand committed to prison for such contempt.

Against this order an appeal was made to the Queen's Bench Division and dismissed on the ground that no appeal lay from an order in an interlocutory proceeding.

A further appeal was then made to the Court of Appeal.

T. H. Richmond, for the defendant Harris. The order in question was a proper subject of appeal to the Divisional Court. The

1888

JONAS v. LONG.

right to appeal is given in equity cases by s. 18 of the County Courts Act, 1865, by which "if any party in a suit or matter under this Act shall be dissatisfied with the determination or direction of a judge of a county court on any matter of law or equity, or on the admission or rejection of any evidence, such party may appeal from the same." By s. 89 of the Judicature Act, 1873, an inferior Court having equity jurisdiction may act in as full and ample a manner as the High Court. There is power to commit for non-compliance with an interlocutory order: *Richards* v. *Cullerne* (1); and if such an order of committal is not subject to appeal the power of the inferior Court is not similar to, but more extended than that of the High Court.

[He cited *Carr* v. *Stringer* (2), *Cooper* v. *Busbridge* (3), and *Williams* v. *Williams.* (4)]

Johnston Watson, for the plaintiff. It has been held under s. 14 of the County Courts Act, 1850, that there is no appeal from decisions in interlocutory proceedings, as such decisions do not dispose of causes, and do not amount to a determination or direction in point of law within the meaning of the enactment: *Blowers* v. *Rackham.* (5) The same considerations apply to appeals under the County Courts Act, 1865.

[He cited *Draycott* v. *Harrison.* (6)]

T. H. Richmond, in reply.

[A further preliminary objection to the hearing of the appeal was then argued.]

FRY, L.J. Two questions have been raised in this case which require decision before the merits can be inquired into. The first is, whether an appeal lies in an interlocutory proceeding of this nature. The question arises in an action brought in the county court by Jonas, one of the partners, for a winding-up of the co-partnership. In the course of the proceedings it was found that Harris owed money to the co-partnership, and after he had been examined he was ordered by the county court judge to pay the money into Court by a fixed time, and further to deliver up

(1) 7 Q. B. D. 623.
(2) E. B. & E. 123.
(3) 16 L. T. (N.S.) 5.
(4) 37 L. J. (Eq.) 854.
(5) 20 L. J. (Q.B.), 397.
(6) 17 Q. B. D. 147.

1888

JONAS v. LONG.

Fry, L.J.

certain documents. These proceedings were taken under the jurisdiction conferred by the County Courts Act, 1865, which gave an equitable jurisdiction to county court judges. It appears that Harris neglected to obey the order, and an order for his attachment was made by the county court judge; this order was made under the jurisdiction conferred by the Judicature Act, 1873, and was interlocutory. We have to decide whether an appeal will lie from such an order made in a county court in the exercise of its equitable jurisdiction.

It will be convenient here to state how the law stood at the time the statute was passed which conferred that jurisdiction. The principal Act regulating county courts is the County Courts Act, 1850 (13 & 14 Vict. c. 61), and s. 14 of that Act provides that if either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said Court in point of law or upon the admission or rejection of any evidence, such party may appeal. The Act then proceeds to give the Court which hears the appeal the right to do one of two things: either to order a new trial or to direct that judgment be entered for either party, thus giving an alternative power, together with a power as to costs which I need not further refer to. It is obvious that the relief given by this Act on appeal was applicable not to interlocutory proceedings, but to final judgments and orders only, for the alternative powers of ordering a new trial and entering judgment which are given to the Appeal Court are not applicable to the former. Accordingly when an appeal was brought from interlocutory proceedings in the county court, the Court declined to hear it; that was determined in *Carr* v. *Stringer* (1), by which case I believe that the practice was finally settled.

In the year 1865 the legislature was minded to give to the county courts jurisdiction in equity up to the amount of 500*l.*, a far larger amount than the limit of their common law jurisdiction. Having given this jurisdiction, the legislature also thought fit to give a power of appeal. That is given by s. 18 of the County Courts Act, 1865, which section is modelled on the form of the section in the County Courts Act, 1850, giving

(1) E. B. & E. 123.

1888

JONAS v. LONG.

Fry, L.J.

the right of appeal in common law matters, but with certain differences worthy of remark. As to the persons who are to have the right of appeal, the section uses language like that of the earlier statute. But when the appeal came on for hearing, what were the powers conferred on the Appeal Court? They were to make such final or other decree or order as they might think fit. I pause here to contrast the powers given to the Vice-Chancellor with that given to the Appeal Court in common law matters. The latter could only grant a new trial or enter judgment, while the Vice-Chancellor could make a final or other decree or order (which I think can only mean a final decree or other decree or a final order or other order), language which is obviously intended to be wider than that used with regard to common law appeals, and intended expressly to confer the power of making orders in interlocutory matters; if this be not the meaning of the section, I do not know what the "other" decrees and orders are to which reference is made. Whether we take the language of the section alone, or whether we contrast it with that used in the previous statute, it seems clear to me that the right of appeal in equity is not confined to an appeal in final matters. It is suggested that although the language of the two sections is different, the intent of the legislature was in both cases the same. I must confess that that is an argument which I always listen to with suspicion; and I certainly think that, where one section is modelled on another, presumably a difference of language expresses a difference of intention. It is easy to see why the legislature should give a larger power of appeal from proceedings on the equity side than from proceedings on the common law side of the county courts; the greater complexity of the cases, the greater importance of interlocutory orders, and the greater amount to which the jurisdiction extends are all circumstances which might have influenced their determination. On this first point, therefore, I am clearly of opinion that there is an appeal in interlocutory proceedings in equity from the county court judge.

[The Lord Justice then dealt with the second preliminary objection, which he adjudged to be well founded, and that the appeal should be dismissed.]

1888

JONAS v. LONG.

LOPES, L.J. The question whether there is an appeal from interlocutory orders made by a county court judge sitting in equity depends upon the construction to be put upon s. 18 of the County Courts Act, 1865, and upon carefully reading that section it is apparent that it uses words of a most general character. I can put upon it no other construction than that it includes appeals from interlocutory orders, and that is a reasonable construction when it is borne in mind that an appeal lies of right in all equity cases, and that the right of appeal is not limited to claims exceeding 20*l.*, as it is in common law actions. The language of s. 14 of the County Courts Act, 1850, strongly favours this construction. That gave a right of appeal in all common law actions where the claim exceeded 20*l.*, and gave power to the Appeal Court to order a new trial or to enter judgment. That section clearly deals with the final determination of the action and with nothing else, and upon that statute it has been held in *Carr* v. *Stringer* (1) that no appeal lies from interlocutory orders made in a common law action, and of the correctness of that decision I have no doubt. In this case I think there is an appeal as to the order in question.

[The Lord Justice concurred in the judgment as to the second point, and that the appeal should be dismissed.]

Appeal dismissed.

Solicitor for appellant: *George Johnson.*

Solicitors for respondent: *Robinson & Dees.*

(1) E. B. & E. 123.

A. M.

[IN THE COURT OF APPEAL.]

1888
Feb. 6.

KELLY & CO. *v.* KELLOND. THOMAS, CLAIMANT.

Bill of Sale—Schedule—Inventory of Personal Chattels—"Specifically described"—After-acquired Property—Form of Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 5, 9.

A bill of sale contained an assignment, by way of security for the payment of money, of the chattels specifically described in the schedule thereunto annexed "together with all other chattels and things, the property of the mortgagor, now in or about the premises, and also all chattels and things which may, at any time during the continuance of this security, be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to the chattels and things hereby assigned."

Held (affirming the judgment of the Queen's Bench Division), that the bill of sale was void on the ground that it departed from the precise legal effect of the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

Ex parte Stanford, In re Barber (17 Q. B. D. 259) discussed.

Roberts v. *Roberts* (13 Q. B. D. 794) questioned.

APPEAL from a judgment of the Queen's Bench Division affirming a judgment of a county court.

By a bill of sale dated August 24, 1886, and given as a security for money, the defendant granted to the claimant the chattels "specifically described in the schedule hereunto annexed, together with all other chattels and things the property of the mortgagor now in or about the premises, and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or addition to the chattels and things hereby assigned," with authority to the mortgagee to enter upon any premises where the goods might be and remove and sell them.

The plaintiffs having recovered judgment against the defendant execution was issued against the goods of the defendant, which were claimed by the grantee of the bill of sale, and an interpleader issue was tried in the Marylebone County Court. It then appeared that the goods specifically described in the

1888

KELLY & Co. v. KELLOND.

schedule had been seized as well as other goods that had been brought on the premises since the date of the bill of sale. The claimant made no claim against the last-mentioned class of goods. The county court judge held that the deed was void as not being in accordance with the form given in the Bills of Sale Act (1878) Amendment Act, 1882, and gave judgment for the execution creditors. This judgment was upheld by the Divisional Court.

The claimant appealed.

MacClymont, and *Herbert Reed*, for the appellant. The only goods that are claimed under the bill of sale are those that are scheduled. As to these the bill of sale is effective, for some meaning must be given to the words in s. 4, "except as against the grantor," which shew that such a bill of sale is valid as to the goods included in the schedule. If, on the other hand, the inclusion in the security of goods other than those specifically described in the schedule is held to make the deed void under s. 9, the effect is to reject s. 4 altogether. This cannot be done, and s. 9 must be controlled by s. 4.

Roberts v. *Roberts* (1) establishes that a grant of after-acquired property does not invalidate a grant of existing property, and since then a large number of deeds have been framed on that basis, and there are many reported cases in which the point might have been raised if it had not been considered as settled by *Roberts* v. *Roberts*. (1) That decision is not overruled by *Ex parte Stanford, In re Barber* (2) either expressly or impliedly. The object of that case was to lay down a rule by which to determine whether bills of sale were invalid or not under s. 9, and not to interfere with previous decisions. Under the rule laid down the deed in the present case is valid, for it does not go beyond the legal effect of the deed authorized by the Act. *Furber* v. *Cobb* (3), decided since *Ex parte Stanford* (2), establishes that a covenant to replace and repair articles destroyed, injured, or deteriorated, does not invalidate the deed; yet such new articles could not be specifically described in the schedule.

(1) 13 Q. B. D. 794. (2) 17 Q. B. D. 259.
(3) 18 Q. B. D. 494.

The object of the Bills of Sale Acts—to make the position of the grantor with regard to goods apparent and certain—would be attained by holding the deed to be valid under s. 4 as to all the articles specifically described, but void as against everyone but the grantor, as to all other articles mentioned in the body of the deed.

[They cited also *Crosser* v. *Maxwell* (1); *Goldstrom* v. *Tallerman* (2); and *Lumley* v. *Simmonds*. (3)]

Lumley Smith, *Q.C.*, and *Rose Innes*, for the respondents, were not called on.

LORD ESHER, M.R. It seems to me that we must now construe every bill of sale that comes before us according to the rule of construction laid down by this Court in *Ex parte Stanford* (4), which must be applied to each individual case. Before that decision we had endeavoured to state the rule of construction, but we knew that there were some judges who did not think that the rule we had laid down was sufficiently effective to enable people to act on it, and, therefore, as in cases arising out of bills of sale the decision of this Court is in nearly every case final, we determined to try whether, having the assistance of all the members of the Court, we could not lay down some rule of construction more easy of application, and more accurate than that which had been laid down. It followed from that, that if we found it necessary to alter the former rule, the new one would take its place, and decisions under the former would have to be considered as overruled if they would have been different had they been given under the new rule. This was done by this Court, after consideration, in *Ex parte Stanford* (4), and the old rule was said not to be a good working rule, but one which would have an effect which would vary according to different men's minds, and an attempt was made to lay down a rule which should be intelligible to all. After stating that the former rule was not sufficiently accurate to be acted upon, the judgment goes on to say: "a bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect. But a

(1) W. N. 1885, p. 95.
(2) 18 Q. B. D. 1.
(3) 34 Ch. D. 698.
(4) 17 Q. B. D. 259.

1888

KELLY & Co. v. KELLOND.

Lord Esher, M.R.

divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect." There is the rule laid down in its most general form: "We must take the form, interpreted by the light of the Act, on the one hand, the instrument to be discussed on the other; and we must then consider whether, but for the avoidance inflicted by s. 9 of the statute, the instrument as drawn will, in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form, or whether the instrument in respect of such variance would be calculated reasonably to deceive those for whose benefit the statutory form is provided. If so, the variance is material, and the bill of sale is not in substantial accordance with the statutory precedent." Therefore, we first lay down that it must be in substantial accordance, and then we state the rule by which to determine whether it is so or not: "Whatever form the bill of sale takes, the form adopted by it in order to be valid must produce, not merely the like effect, but the same effect, that is to say, the legal effect, the whole legal effect, and nothing but the legal effect which it would produce if cast in the exact mould of the schedule. Such a test as this contains no element of uncertainty, is one which every lawyer throughout the kingdom is competent to apply, and is based upon a method of interpretation familiar to our Courts." That is the rule of construction, and if that rule, had it been applied, would have altered the decision of any case decided before it was laid down, we must now say that such decision was wrong, and is no longer an authority.

This Court is one composed of six members, and if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think this Court is entitled, sitting as a full Court, to decide whether we will follow or not the decision arrived at by the smaller number. Now if *Roberts* v. *Roberts* (1) is inconsistent with *Ex parte Stanford* (2) it must

(1) 13 Q. B. D. 794. (2) 17 Q. B. D. 259.

1888

KELLY & Co. v. KELLOND.

Lord Esher, M.R.

be disregarded. We have, therefore, to see if this bill of sale, notwithstanding any previous authorities, is one that comes within the rule now laid down. It is obvious to my mind that it has a greater legal effect than the form in the schedule. It includes goods not specifically described in the schedule, and not mentioned in it at all, and which could not be described in it. This certainly gives a greater legal effect than if the bill of sale were confined to goods specifically described in the schedule, and the deed is consequently void by the operation of s. 9.

But it is said that the effect of s. 9 which makes it void is cut down by ss. 4 and 5, because there is an inconsistency, and some meaning must be attached to the earlier sections. I think the suggestion of Fry, L.J., meets this difficulty, and that ss. 4 and 5 apply to the schedule to the bill of sale, while s. 9 applies to the whole bill of sale. If so there is no inconsistency, and s. 9 is not cut down by the other sections. The bill of sale is consequently void, and this appeal must be dismissed.

FRY, L.J. I am of the same opinion. We have in the present case to deal with a bill of sale by which the grantor assigned the goods specifically described in the schedule. If the deed had stopped there it would have been in the form given in the schedule to the Act. But it goes on to assign other chattels than those described in the schedule—goods then about the premises but not described in the schedule, and goods that during the continuance of the security may come upon the premises in substitution for, renewal of, or addition to the chattels assigned. The first inquiry is whether that is in accordance with the schedule to the Act of 1882. The Master of the Rolls has already pointed out the proper rule of construction laid down by this Court in *Ex parte Stanford.* (1) Reading this bill of sale by the side of that in the schedule to the Act, I cannot for a moment doubt that the former goes far beyond the latter in legal effect, for it would convey property which could not be dealt with in a deed which followed the form in the Act, for it deals with property which is not described in the schedule attached to it. It therefore goes beyond the legal effect of the form of bill of sale given

(1) 17 Q. B. D. 259.

1888

KELLY & Co. v. KELLOND.

FRY, L.J.

in the Act, and is void. As to the power of this Court when sitting as a full Court to overrule the decision of a Court consisting of a smaller number, I do not think it is necessary to give an opinion. I think that is a matter of very great importance, and if it ever should become a matter for consideration I should desire to consider it carefully. Without expressing either doubt or opinion on that point, it seems to me that in the case of *Roberts* v. *Roberts* (1) the precise point now before us was not determined. The point of divergence from the form given in the Act which was dealt with in that case was the omission of the words "by way of security." The want of description in the schedule was dealt with as being a question under ss. 4 and 5. The precise point now before us was not determined, and we are, therefore, bound to decide it by the case of *Ex parte Stanford.* (2)

The next point to consider is whether, although the words of s. 9 are general, the terms of the previous sections, 4 and 5, must be taken to limit it in cases where the departure from the authorized form is only in respect of the description in the schedule to the bill of sale. It appears to me that, on the true reading of the Act, s. 9 deals with the form of the bill of sale and avoids an instrument which materially differs from the form given by the Act against the grantor and every one else, while ss. 4 and 5 deal with the description in the schedule and not with the form of the body of deed. Suppose, for instance, a bill of sale in the form given by the Act, followed by an inventory which described chattels, but as to some of them contained no specific description or a specific description of things of which the grantor was not the true owner. In that case we should have a bill of sale in the form given in the Act, and therefore not avoided by s. 9, but imperfect under ss. 4 and 5, and such a bill of sale would be avoided, as to the chattels imperfectly described, or of which the grantor was not the owner, against every one but the grantor. That appears to me to prevent any inconsistency between the limited avoidance in ss. 4 and 5 referring to the schedule, and the general and absolute avoidance in s. 9 referring to the form of the bill of sale.

(1) 13 Q. B. D. 794. (2) 17 Q. B. D. 259.

LOPES, L.J. It is to be observed that the words objected to in this bill of sale are in the deed and include after-acquired property. Now the form of bill of sale given in the schedule to the Act of 1882 assigns only things capable of being specifically described in a schedule. The question therefore arises whether this is such a difference that the bill of sale can be said not to be in accordance with the form in the schedule to the Act so as to make it void under s. 9. I do not desire to express an opinion as to what is the power of a full Court of Appeal in respect of a decision of three of their number, but I understand that the full Court was called together in *Ex parte Stanford* (1) to consider the question arising in that case, and to revise and reconsider any decision touching the point in that case which had been previously laid down. The rule laid down in that case was that a bill of sale is in accordance with the prescribed form if it does not depart from it in any material respect, that is, if it gives a legal effect neither greater nor smaller than that which would attach to it if drawn in the form sanctioned. Now this deed certainly would have, if upheld, a greater legal effect than a deed in the prescribed form, for it deals with goods which may at any time be on the same or other premises of the grantor (to which they may have been removed), whether brought there in substitution for, or renewal of, or in addition to, the chattels assigned. This deed, therefore, is not in accordance with the form according to the test supplied in *Ex parte Stanford, In re Barber*. (1) I do not consider it necessary to express an opinion on the case of *Roberts* v. *Roberts* (2), because if it decided what is contended for by the grantee it is overruled by *Ex parte Stanford*. (1) A number of cases have been cited in which the point might have been but was not taken, but I do not think they can affect our decision.

With regard to ss. 4 and 5 of the Act, it is said they are not consistent with the decision at which we have arrived, because some effect must be given to the reservation of right against the grantor contained in those sections. I think, however, that the suggestion of my brother Fry meets that difficulty, and I agree that s. 9 deals with the form of the deed and schedule, but ss. 4

(1) 17 Q. B. D. 259. (2) 13 Q. B. D. 794.

1888

KELLY & Co. v. KELLOND.

and 5, with the question whether the goods are specifically described in the schedule. I think, therefore, this appeal should be dismissed.

Appeal dismissed.

Solicitors for claimant: *Cooper & Sons.*

Solicitors for execution creditors: *Montague Scott & Baker.*

A. M.

March 1, 2, 5.

[IN THE COURT OF APPEAL.]

LONDON FOUNDERS ASSOCIATION, LIMITED, AND PALMER *v.* CLARKE.

Company—Sale of Shares—Custom of Stock Exchange—Refusal of Company to register Transfer—Action to recover Price.

A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company.

The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had and received to his use:—

Held, following *Stray* v. *Russell* (1 E. & E. 888, 917), that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the company would register the transferee, and that the action was not maintainable.

APPEAL of the plaintiff Palmer from the judgment of Stephen, J., at the trial without a jury.

The action was brought to recover back money paid as the price of shares in the National Conservative Industrial Dwellings Association, Limited; and the facts were in substance as follows: The defendant had sold through a broker, and the plaintiffs, the London Founders Association, Limited, had purchased through a broker, upon and subject to the rules of the Stock Exchange, certain shares in the National Conservative Industrial Dwellings Association, Limited. By the articles of association of the last mentioned company the directors might in their discretion admit, or decline to admit, as a member any person claiming by transfer of a share or shares.

1888

LONDON FOUNDERS ASSOCIATION v. CLARKE.

On the name-day the name of the plaintiff Palmer was given by the plaintiffs, the London Founders Association, as the person to whom the shares were to be transferred: and a duly executed transfer of the shares having been handed to Palmer, the price of the shares was thereupon paid to the defendant.

The directors of the National Conservative Industrial Dwellings Association, on being subsequently applied to in the ordinary course to register the transfer, in the exercise of the discretion given to them by the articles of association, refused to register the plaintiff Palmer as transferee of the shares. It appeared to be admitted that, according to the rules and practice of the Stock Exchange, payment of the price of the shares had to be made upon the delivery of the transfer and before the time when application would be made by the transferee for registration.

The learned judge gave judgment for the defendant, against which the plaintiff Palmer appealed.

1888. March 1, 3, 5. *H. F. Dickens*, and *W. E. Gordon*, for the plaintiff. A share in a company means not only the right to receive dividends but the right to take part in the meetings of the shareholders and all that constitutes the status of a shareholder: *Colonial Bank* v. *Whinney* (1); *Emmerson's Case.* (2) The subject-matter involved in a sale of shares must, therefore, include all the rights and liabilities that go to make up the status of a shareholder. The transfer of the shares is not the contract, but only one step in performing the contract and conferring on the purchaser the status of the vendor as a shareholder. The vendor's contract is not only to execute a transfer of the shares and hand over the certificates, but that the company when applied to will register the transfer and the vendee shall so obtain the full status of a shareholder: *Wilkinson* v. *Lloyd* (3); *Bermingham* v. *Sheridan.* (4) The case of *Stray* v. *Russell* (5), which will be relied on for the defendant, was a case where the question turned upon the practice and rules of the Stock Exchange. It is contended that the rules of the Stock Exchange are mere machinery by which the vendor and ultimate

(1) 30 Ch. D. 261; 11 App. Cas. 426.
(2) Law Rep. 1 Ch. 433.
(3) 7 Q. B. 27.
(4) 33 Beav. 660.
(5) 1 E. & E. 888, 916.

1883

LONDON FOUNDERS ASSOCIATION v. CLARKE.

purchaser are brought together, and, the question here arising between the vendor and ultimate purchaser and not involving any question affecting the liabilities of any person on the Stock Exchange, or under the rules of the Stock Exchange, the case may be looked at apart from such rules, and simply as if there had been a private contract by one person for the sale of shares to another. Could it then have been doubted that the contract would be that the purchaser should be able to obtain all that constitutes the status of a shareholder? In *Stray* v. *Russell* (1) the evidence did not shew that the purchaser of the shares could not have obtained registration if he had used reasonable endeavours to do so, and the case was decided on that ground in the Exchequer Chamber. There is no authority binding on this Court that, where the contract is according to the rules of the Stock Exchange, the vendor does not contract that the company will register the transferee. Though the contract on the Stock Exchange may contemplate payment of the purchase-money upon delivery of the transfer and before the question of registration arises, that payment may reasonably be implied to be conditional, and dependent upon the performance of the condition subsequent that the company shall register the transfer; and, if that condition is not performed, the whole contract may be treated as at end, for the contract of the vendor is an entirety: viz., to cause to be transferred to the purchaser his status of a shareholder; and therefore on his failure to do that the purchaser may throw up the contract, and then there is a total failure of consideration. Assuming that the transferor would be a trustee for the transferee of dividends received, that is not what the purchaser contracted for, but the legal status of a shareholder.

[They also cited *Evans* v. *Wood* (2); *Hodgkinson* v. *Kelly* (3); *Skinner* v. *City of London Marine Insurance Corporation* (4); *Taylor* v. *Stray* (5); *Paine* v. *Hutchinson* (6); *Remfrey* v. *Butler* (7); *Maxted* v. *Paine* (8); Lindley on Partnership, 4th ed., pp. 712, 714, 722.]

Horne-Payne, Q.C., and *A. G. M. McIntyre*, for the defendant, were not called upon.

(1) 1 E. & E. 888, 916.
(2) Law Rep. 5 Eq. 9.
(3) Law Rep. 6 Eq. 496.
(4) 14 Q. B. D. 882.
(5) 2 C. B. (N.S.) 175, 197.
(6) Law Rep. 3 Ch. 388.
(7) E. B. & E. 887.
(8) Law Rep. 6 Ex. 132.

1883

LONDON FOUNDERS ASSOCIATION v. CLARKE.

LORD ESHER, M.R. In this case a contract was made through brokers on the Stock Exchange for the sale and purchase of shares in a limited company. The articles of association of the company gave power to the directors to decline to admit any person claiming as a transferee of the shares to be a member of the company. The case may be treated apart from the mere machinery of the Stock Exchange, and, as if the dispute were between the parties to a contract by which the plaintiff purchased the shares from the defendant, and the defendant sold the shares to the plaintiff according to the rules and practice of the Stock Exchange. The transfer of the shares was executed and handed over to the plaintiff Palmer, the transferee, or his brokers, and thereupon according to the usage of the Stock Exchange the agreed price was paid by the plaintiff. After that the name of the transferee was in the ordinary course submitted to the company for registration, but the directors, in the exercise of their power under the articles of association, declined to register the transfer, whether rightly or wrongly appears to me to be immaterial to the present case. Thereupon the plaintiff brings an action to recover back the price of the shares. It was admitted by the plaintiff's counsel that he must contend that, although the contract was for payment of the price of the shares when the transfer was handed over, and before the name of the transferee was submitted to the company with a view to registration, it was an implied term of the contract by way of condition subsequent that, if the company for any reason refused to register the transfer, the contract should be considered at an end, and the price would then be recoverable on the ground of a total failure of consideration. That contention involves two propositions; first, that there is such a condition subsequent; secondly, that there would be a total failure of consideration. Whether it could be maintained that there would be such a total failure of consideration according to my view we need not inquire: because in my opinion the first proposition cannot be maintained. I think it would be absolutely wrong at this time of day to throw any doubt upon the true construction of such a contract as this made on the Stock Exchange, or to admit for a moment the contention that there is such an implied condition subsequent as suggested. That contention put in plain words

1888

LONDON FOUNDERS ASSOCIATION v. CLARKE.

Lord Esher, M.R.

really implies that the seller has contracted absolutely that the company will register the transfer to the purchaser or his nominee. In the year 1859 the very same point in precisely such an action as this came before the Court of Queen's Bench in the case of *Stray* v. *Russell* (1), and was decided, and that decision is binding until reversed. In that case *Wilkinson* v. *Lloyd* (2) was cited, and thereupon Lord Campbell, C.J., at once formulated the true question. On p. 897 of the report he says "The test will be whether the contract wholly failed by reason of something omitted to be done by the vendor. . . . . You have to shew here that the vendor here was equally bound as was the vendor in that case to obtain the directors' consent." When the Court came to decide the question, the distinction between the cases was pointed out: and they held that the plaintiff's counsel had failed to shew that the defendant was legally bound to obtain the directors' consent. The Chief Justice, at p. 900 of the report, says: "Here the purchase of shares in a joint stock banking company was made at the request of the plaintiff by a broker on the Stock Exchange in London, and must be considered as made with reference to all the established usages of the Stock Exchange. According to these usages the price of the shares is payable on the one broker handing over to the other the transfers and certificates. What does the vendor contract to sell and deliver? Genuine transfers and certificates with the interest and rights which they convey. There might be a condition subsequent imposing on the vendor the onus of procuring the consent of the directors to the transfer; but I find no evidence of such a condition." Crompton, J., said: "The fact of the payment being to be made on the handing over of the certificates and transfers, and the practice stated as to no prior consent being ever asked for, and as to no assent being ever refused, make it very probable that the vendee in such case bargains only for the delivery of the shares and transfers, and takes the chance of getting himself or his nominee or subvendee accepted and registered. The plaintiff must be taken to know of the clause in the deed as to the consent, and he may well have bought taking the chance of procuring such acceptance or registration on himself. In *Wilkinson* v. *Lloyd* (2) the Court assumed

(1) 1 E. & E. 888. (2) 7 Q. B. 27.

that the consent to the assignment was a part of the vendor's title, as in the case of sale of a lease; but whatever may have been the case of the purchase of the partnership shares in the mines (real property to some extent) in that case, on a sale between the parties not according to any course of business on the Stock Exchange, I can make no such assumption in the present case, where the sale was according to the regulations of the Stock Exchange, which made the price payable on handing over the shares and transfers, and according to which it is at least probable that the vendee was to take upon himself the duty of getting the transfers completed and the shares registered, and where from the nature of the transaction it seems to me very unlikely that the vendor should undertake for the acceptance of any particular name or person, when he may have been entirely ignorant at the time of the contract of the name and responsibility of the intended transferee." The Court was there asked to introduce an implied term into the contract, and they acted on the rule that such an implication cannot be made, unless it be clear that both parties must have intended what the Court is asked to imply. They thought it unlikely that the parties would agree that money should be paid and received, and then, upon the happening of something over which neither of them had any control, that the money should be paid back; and therefore they held that the suggested implication could not be made. Taking the decision of the Queen's Bench alone, I do not think that, even if we did not agree with the reasons they gave, we could nearly forty years afterwards overrule a decision as to the construction of a contract in daily mercantile use, which must be taken to have been the basis upon which all subsequent contracts of the same description were made. But, speaking for myself, I think the view taken by the Queen's Bench was confirmed by the Exchequer Chamber (1 E. & E. 917). In my opinion, if the plaintiff's counsel were right in his contention, the contract must involve an absolute undertaking by the seller that the company will accept the purchaser or his nominee as a member of the company. But when the case of *Stray* v. *Russell* (1) came before the Exchequer Chamber, Wightman, J., said, in delivering the judgment: "We all think

(1) 1 E. & E. 830, 917.

1888

LONDON FOUNDERS ASSOCIATION v. CLARKE.

Lord Esher, M.R.

that, construing the contract in this case by the usage of the Stock Exchange subject to which it was made, there was no undertaking by the vendor of the shares to obtain absolutely the consent of the directors to the transfer." It seems to me that to hold the plaintiff's contention to be correct would be in direct contravention of what was so said. I have no doubt that the seller must not prevent or do anything to prevent the company from accepting the purchaser or his nominee. What the remedy would be, if he did, it is unnecessary now to consider. There is nothing here to shew that the seller in this case did anything of the kind. I do not think anything turns on the fact that by the articles of association the directors had an option to decline to register the proposed transferee. If they had no such option and wrongfully refused to register the transfer, it seems to me the same considerations would apply. The purchaser in that case, it is true, might have a remedy against the company, but I do not think that the vendor does undertake that the company will accept the purchaser so as to make himself responsible for their refusal to do so. The purchaser takes that risk on himself, and the seller's liability is satisfied by handing to the purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser. I must say that, considering the matter as a matter of business, apart from authority, I should have come to the same conclusion as the Court of Queen's Bench, and declined to imply the suggested condition subsequent. It does not seem to me a business-like or possible agreement under the circumstances that a man should receive money on the condition subsequent that, if something afterwards happen over which neither of the parties has any control, the money shall be paid back. Therefore I think the decision in *Stray* v. *Russell* (1) was right, but, if I were bold enough to disagree with the opinion of the judges in that case, I do not think we could at this distance of time overrule it, because subsequent contracts have for a long period of time no doubt been made with knowledge of that decision. For these reasons I think the appeal must be dismissed.

(1) 1 E. & E. 888.

1888

LONDON FOUNDERS ASSOCIATION v. CLARKE.

FRY, L.J. I agree that this appeal should be dismissed. The main subject of inquiry in this case, and the only one as to which I shall say anything, is as to the real nature of the contract entered into by the parties. The contract was for sale and purchase of shares subject to the rules of the Stock Exchange, such shares not being securities that passed by delivery but by transfer, the directors of the company having, however, by the articles of association, power to refuse to register the transfer if they did not approve of the transferee. The counsel for the plaintiff contended that the true nature of the contract was to the effect that, the vendee agreeing to pay the purchase-money, the vendor agreed to procure that the company should register the vendee as owner of the shares, and the vendee should so obtain the status of a member of the company; and that, the vendor having failed to perform that agreement, there was a total failure of consideration. The other view of the contract is that it is merely to the effect that the vendor agrees that on payment of the agreed price he will hand to the vendee a genuine transfer and certificates, and that there is no condition subsequent such as suggested, viz., that, if the company refuse to register the transferee the price shall be refunded. The question is, which of these is the true view of the effect of the contract? It seems to me that the nature of the machinery or arrangements of the Stock Exchange affords strong reason for thinking that the latter is the true construction of the contract. The practice requires that on a certain day the name of the proposed transferee shall be given, and that on the delivery of a duly executed transfer, with the certificates of the shares, to such transferee, payment of the price shall be made. The execution of the transfer and payment of the price are prior to the time at which the exercise of the power of the directors to accept or refuse the transferee takes place. The natural inference appears to me to be that the intention of the parties was that all which the vendor undertook to do under the contract was to be done prior to the payment of the price and delivery of the transfer. The fact that the payment of the price is to be made before any question of obtaining the consent of the company to the registration arises is strong to shew that the procuring of such consent is not one of

1888

LONDON FOUNDERS ASSOCIATION v. CLARKE.

Fry, L.J.

the things which the vendor undertook. This consideration would of itself lead me to the conclusion that the contention for the plaintiff was contrary to the facts. But in addition we have a decision of the Court of Queen's Bench, now thirty-nine years old, in which the same view was taken. I should be very unwilling to disturb a decision which has stood for so long a time, and on the faith of which thousands of contracts have probably been made. Certain analogies have been pressed upon us with the object of shewing that the decision of the Queen's Bench in *Stray* v. *Russell* (1) was wrong; for instance, the case of an assignment of a lease where the consent of the lessor to the assignment is necessary. No better case could be found to illustrate the distinction between two classes of cases. In that case the consent of the lessor must be obtained before the assignment, and the vendee knows of the necessity for it beforehand, when he examines the abstract of title; and therefore the consent would be required before payment of the price. There the obtaining of the consent would be a condition precedent. So, again, in the case of *Wilkinson* v. *Lloyd* (2) there were regulations of the company which required an owner who was desirous of transferring his shares to inform the company of his intention to transfer, and made the consent of the directors a condition precedent to the validity of the transfer. It appears to me, on these grounds, that the contention of the plaintiff with regard to the nature of the contract fails, and therefore it is immaterial to consider the question whether, if there had been such a breach of contract as alleged, the consideration could be considered to have totally failed.

LOPES, L.J. The question is as to the liability of the vendor of shares in a limited company, which were sold on the Stock Exchange, where the directors of the company had power to refuse, and did refuse, to register the transferee. The vendor is bound to deliver a properly executed transfer with the certificates of the shares within the time fixed, and must for that purpose do whatever may be necessary to a due delivery of the shares, such as paying outstanding calls, &c.; but it is said that there is a further obligation on his part, viz., to procure the consent of

(1) 1 E. & E. 888. (2) 7 Q. B. 27.

1888

LONDON FOUNDERS ASSOCIATION v. CLARKE.

Lopes, L.J.

the directors to the registration of the transferee; and that the whole contract of sale is conditional on the ultimate introduction of the transferee's name upon the register, and that, if that cannot be procured, the vendee is entitled to recover back the price paid for the shares. I do not wish to repeat what has been already said by the Master of the Rolls and my brother Fry. It is sufficient, therefore, for me to say that I do not think that any such condition subsequent can be read into the contract. The case of *Stray* v. *Russell* (1) is a clear authority that the vendor of the shares is not under any liability to procure the consent of the directors to the transfer or the registration of the transferee. For these reasons I think that the appeal fails.

Appeal dismissed.

Solicitors for plaintiff: *Robinson, Poole, & Robinson.*
Solicitors for defendant: *Morley & Sherriff.*

E. L.

SWAIN *v.* AYRES AND OTHERS.

Nov. 16, 17.

Landlord and Tenant—Lease—Agreement for Lease—Forfeiture—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

By an agreement made in 1853 the owner of a house and land agreed to let them for a term of eighty years from the date of the agreement, and to execute a lease thereof for the same term, and the tenant agreed to accept such lease and execute a counterpart, and within eighteen months from the date of the agreement to lay out 100*l.* at least in permanent repairs and improvements to the satisfaction of the owner; and the agreement also provided that the lease should be executed when the 100*l.* had been so laid out, and should contain usual covenants including a covenant to keep the demised premises in good repair, and a proviso for re-entry on breach by the tenant of any of the covenants. No lease was executed. In an action by the reversioner to recover possession of the premises for a forfeiture by reason of the tenant's breach of the covenant to repair:—

Held, that the agreement did not constitute a "lease" within the meaning of s. 14 of the Conveyancing and Law of Property Act, 1881, and therefore that the forfeiture could be enforced without serving upon the tenant the notice required by that section.

ACTION, tried before Charles, J., without a jury, to recover possession of a house and premises in High Road, Lee, in the county of Kent, and for mesne profits.

(1) 1 E. & E. 888.

1887

SWAIN v. AYRES.

The statement of claim alleged (inter alia) that the defendants were tenants of the house and premises upon the terms of an agreement for a lease dated July 25, 1853, and that the tenancy had been forfeited by reason of the breach by the defendants of certain terms and conditions to pay rent and repair the premises contained in such agreement.

The defence (inter alia) alleged that the plaintiff had not served upon the defendants the notice required by the Conveyancing and Law of Property Act, 1881, s. 14. (1)

By the agreement of July 25, 1853, E. Larwell, for himself, his executors, administrators and assigns, agreed to let and within the time thereinafter mentioned to demise and lease the premises in question to H. G. Mortimer, his executors, administrators, and assigns, from June 24, then last for a term of eighty years, at a specified yearly rent, payable quarterly; and Mortimer agreed to accept a lease of the same premises, and to execute a counterpart, without requiring production of the lessor's title, and to lay out within eighteen months of the date of the agreement a sum of 100*l.* at least in permanent repairs and improvements to the satisfaction of Larwell; and the agreement provided that the lease and counterpart should be executed when such sum of 100*l.* had been laid out, and that the lease should contain all usual covenants, and particularly covenants to pay rent and to keep the property in good repair, and that on the breach by Mortimer of any of the covenants or agreements therein specified the agreement should become void, and Larwell should be at liberty to re-enter and take possession. No lease was executed in pursuance of that agreement.

The plaintiff sued as assignee of the reversion expectant upon the determination of the term of eighty years, and the defendants

(1) 44 & 45 Vict. c. 41, s. 14: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serve on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

1887

SWAIN v. AYRES.

were in possession as under-tenants of Mortimer's personal representatives.

At the trial evidence was given on behalf of the plaintiff that one year's rent was due and owing in respect of the premises, and that they were not kept in repair according to the terms of the agreement; and it was admitted that no notice under s. 14 of the Conveyancing and Law of Property Act, 1881, had been given by the plaintiff before action.

Finlay, Q.C., and *Lush Wilson*, for the plaintiff. The word "lease" in s. 14 does not include an agreement for a lease. Sub-s. 3 defines the various things which "lease" shall include, and an agreement for a lease is not one of them. Where it was intended to include an agreement for a lease the Act has included it in terms, as in s. 18, which gives a mortgagor in possession power to make "leases," and provides by sub-s. 17 that the provisions of the section referring to a lease shall be construed to extend and apply to an agreement, whether in writing or not, for leasing or letting. The provisions of 22 & 23 Vict. c. 35, s. 9, and of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), which enable the Courts to grant relief against forfeiture to tenants, were clearly intended to apply to leases, and not to agreements for leases; and s. 14 of the Conveyancing and Law of Property Act, 1881, was enacted with respect to the same subject-matter. The Courts of Chancery would not have granted specific performance of this agreement.

Tatlock, and *Moyses*, for the defendants, contended that the judgment of the Court of Appeal in *Walsh* v. *Lonsdale* (1) established that a tenant holding under an agreement for a lease, where the Court would grant specific performance, held under the same terms as if a lease had been granted, and were protected in the same way; that specific performance of the agreement would be granted in the present case, and therefore by reason of that decision the defendants were entitled to notice under s. 14 of the Conveyancing and Law of Property Act, 1881.

CHARLES, J. The plaintiff relies upon two grounds of forfeiture—first, non-payment of rent; and, secondly, breach of the defendants' agreement to keep the demised premises in repair.

(1) 21 Ch. D. 9.

1887

SWAIN v. AYRES.

As to the first ground, the rent is admittedly due, and there has been no tender by the defendants, or waiver by the plaintiff. The action is therefore undefended in this respect, but the defendants can obtain relief against forfeiture under the provisions of the Common Law Procedure Acts.

As to the second ground, there is no doubt that the agreement to repair has in fact been broken, and the substantial defence is that no notice has been given by the plaintiff to the defendants under s. 14 of the Conveyancing and Law of Property Act, 1881. I am clearly of opinion that on the true construction of the document of July 25, 1853, it is not a lease, but an agreement to grant a lease upon the tenant expending 100*l.* in repairs and improvements within eighteen months of the date of the agreement. It was contended for the defendants that, though an agreement for a lease, it must be regarded as a lease in equity, because of some expressions in the judgments of the Court of Appeal in *Walsh* v. *Lonsdale*. (1) But, although there were no doubt some strong expressions in support of that view, I am still of opinion that I ought not to construe the word "lease" in s. 14 as including such an agreement for a lease as this. The decision in that case turns, I think, upon the admission mentioned by Jessel, M.R. (at p. 14): "He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance." In the present case specific performance of the agreement to grant a lease would not be given against the landlord when the tenant had broken his covenant to repair. Sect. 18, dealing with leases of land by mortgagors in possession, expressly extends the provisions of that section to an agreement for a lease, but s. 14 contains no corresponding extension of the meaning of the word "lease" as used in that section. I am, therefore, of opinion that I ought to construe the word "lease" in s. 14 according to its natural sense, and that I can so construe it consistently with the decision in *Walsh* v. *Lonsdale*. (1)

There will therefore be judgment for the plaintiff.

Solicitor for plaintiff: *W. Bristow.*

Solicitors for defendants: *Purser & Cooper.*

W. A.

(1) 21 Ch. D. 9.

HESKETH, Appellant; BRAY, Surveyor of Taxes, Respondent. 1887 Dec. 15.

Revenue—Income Tax—Duty on Income from Lands—Deduction for Cost of Embankment to protect Lands against Encroachment of Tidal River—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Sched. A., s.* 37.

The Income Tax Act, 1853, s. 37, enacts that in charging duty under Sched. A. in respect of lands a deduction shall be made for the amount expended by the owner, on an average of the twenty-one preceding years, in the making or repairing of embankments "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river."

Prior to 1880 the appellant was owner of salt marshes adjoining a tidal river and liable to be flooded at every tide, and he was assessed to the income tax in respect of the small yearly value of the pasturage. The appellant having in 1880 expended a large sum in making an embankment so that the tidal water was excluded and the marshes became valuable inclosed land yielding a large income:—

Held, that such sum was not expended in making an embankment "necessary for the preservation or protection" of the land against the encroachment or overflowing of the tidal river within the meaning of s. 37, because that section did not apply to sums expended in order to increase the capital value of the land to the owner by altering its condition, and therefore that the appellant was not entitled to any deduction from income tax in respect thereof.

Case stated, under 43 & 44 Vict. c. 19, by the Commissioners of Income Tax for the district of Leyland in the county of Lancaster.

The appellant, Sir Thomas Hesketh, appealed to the Commissioners against certain assessments made on himself and several of his tenants under Sched. A. of the Income Tax Act, 1853, whereby they were severally assessed in respect of certain lands in Hesketh Marsh, in the township of Hesketh-with-Becconsall in the above-named district, in various sums amounting to 1572*l.* 10*s.* The appellant, as owner of the whole of the lands, claimed to be allowed, under s. 37 of the Income Tax Act, 1853, a deduction on an average for twenty-one years of a sum of 16,541*l.* expended by him since the beginning of the year 1880 in making an embankment and other necessary works for the protection and preservation (as was alleged) of such lands from the overflowing of the tidal river Ribble.

By the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, Sched. A., r. 5, "particular deductions and allowances in respect

1887

HESKETH v. BRAY.

of the duties under Sched. A." are set forth, and the sixth deduction or allowance is "for the amount charged on lands, tenements, and hereditaments, or heritages, by public rate or assessment in respect of draining, fencing, or embanking the same."

By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 37: "In charging the duty under Sched A. of this Act in respect of lands an allowance and deduction shall be made for the amount expended by the landlord or owner thereof on an average of the twenty-one preceding years in the making or repairing of sea-walls or other embankments necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river, although the sums expended may not have been charged on such lands by any public rate or assessment."

Hesketh-with-Becconsall is a township situate on the south side of, and adjoining to, the estuary of the tidal river Ribble.

In 1858 the appellant's father and predecessor in title bought from the Ribble Navigation Company, in whom the navigation of the River Ribble was vested under a local Act passed in 1853, about 2000 acres of uninclosed land marked as "tidal water" in the Ordnance Survey Map of 1848.

Prior to 1880 this land, by reason of the execution of the powers of the Ribble Navigation Company's Act, and by the consequent changes in the course of the channel of the river, and by consequent gradual accretion, as well before as after the purchase by the appellant's father, had been so far gained or reclaimed that, though still open to the River Ribble and liable to be more or less flooded at every tide, the greater portion (including 1044 acres which were the subject of the appeal) had become covered with short herbage, and formed the salt marsh called Hesketh Marsh.

The land in that condition was worth as pasturage from 5*s.* to 10*s.* per acre per annum, and was assessed to the poor-rate and income tax at from 300*l.* to 350*l.* per annum.

In 1880 the appellant began to execute works in order to exclude the tidal water from a portion, being the land in question, of the 2000 acres. These works, consisting of an embankment

over three miles in length and about twelve feet in height, with the necessary provision for drainage and access by roads, were successfully completed in 1885, and in that year about 526 acres had been brought under cultivation. The total cost incurred by the appellant in executing such works was 16,541*l.*

The land with the tidal water excluded lets at a yearly rental of from 3*l.* to 3*l.* 10*s.* per acre.

The Commissioners dismissed the appeal, being of opinion that the appellant upon the facts stated was not entitled to the deduction from income tax claimed under s. 37 of the Income Tax Act, 1853, and they granted this case on the appellant's application.

C. A. Cripps, for the appellant. The appellant is entitled to the deduction claimed under s. 37 of the Income Tax Act, 1853. It is immaterial for the purposes of that section whether the embankment was made for the reclamation of the land, or for its protection and maintenance when reclaimed. There are no words to create any distinction between reclamation and preservation or protection, nor are any such words to be found in s. 60 of the earlier Act of 1842. The general intention of the legislature in both Acts was to encourage landowners to execute drainage and reclamation works. By the Ribble Navigation Company's Act the company were bound to keep a map of the lands vested in them, and on the map so kept the lands purchased in 1858 by the appellant's father were at that date marked as "reclaimed."

Assuming that the word "lands" in s. 37 means lands assessable to the duties imposed by the other provisions of the Act, the case finds that the lands in question were assessed to the income tax before the embankment was made. It is submitted, therefore, that the amount expended by the appellant in making the embankment was expended "in the making of an embankment necessary for the preservation or protection of lands against the encroachment or overflowing of a tidal river" within the express language of s. 37.

Sir E. Clarke, S.G. (*A. V. Dicey*, with him), for the respondent. The intention of the legislature in s. 60, Sched. A., of the Income Tax Act, 1842, was to entitle the landowner to deduct from his assessable income that which makes it assessable. The

1887

HESKETH v. BRAY.

words of that section, "the amount charged on lands by public rate or assessment in respect of draining, fencing, or embanking the same," clearly point to a deduction in respect of the execution of works for a public advantage, and not for the private profit merely of the landowner. The same intention prevails in s. 37 of the Income Tax Act, 1853. The deduction is a deduction from the rack-rental value of the lands. The Act did not intend to encourage the owner to expend money in enhancing the capital value of his land, but to enable an owner, who has not the benefit of any public rate or assessment in that respect, to deduct from his income tax assessment such expenses as he has necessarily incurred in protecting or preserving the property subject to the tax. In the present case the expenditure in respect of which the deduction is claimed was for the purpose of turning salt marshes into valuable cultivated land, and thus largely increasing its capital value. The deduction, therefore, specified in s. 37 cannot be allowed.

C. A. Cripps, replied.

POLLOCK, B. The only question in this case is whether the appellant, who is the owner of a large property, in respect of which it is admitted he is properly assessed to the income tax, is entitled to a deduction in respect of money which he has expended in building a sea-wall or embankment for the purpose of reclaiming 1044 acres being a portion of that property. The appellant contends that he brings himself within the words of s. 37 of the Income Tax Act, 1853, which is as follows:—[The learned judge read the section.]

It must be remembered that the Act in question is an Income Tax Act, and the assessment is an assessment upon income arising from land. It may, or may not, be desirable that the legislature should give by way of bounty to the landlord some advantage in respect of money spent in reclaiming or improving land, but I can find no such intention expressed in the Acts. The Income Tax Act, 1842, s. 60, Sched. A., r. 5, gave a deduction in respect of the amount charged on lands by public rate or assessment in respect of draining, fencing or embanking the same. It is quite clear, I think, that the legislature meant to allow a deduction

from the gross annual value, but not in any way to allow a deduction in respect of the improvement of the land or the enhancement of its permanent value by the expenditure of capital. That intention does not seem to have been altered in s. 37 of the Income Tax Act, 1853. It is obvious that it would have been very easy to use some such words as "reclamation" or "improvement" if that section had intended that a man should be rewarded for the improvement of his land, and that a deduction from the income tax should be made in respect of his capital expended to procure that improvement. But, to my mind, the object of this Act, shortly stated, was this: It was intended to allow a deduction which was an essential. The words are, "necessary for the preservation or protection," that is, essential for the protection of the particular land in question looking at the status quo it then was, and the preservation or protection intended was the making of either a sea-wall or embankment. Now there is no difficulty in giving full effect to those words, because in this country it is known as a matter of history that these embankments have from time to time been absolutely necessary to prevent the encroachment or overflowing of the sea or tidal rivers. Again, one would not speak of the rising of the tide daily or twice in the day as an encroachment or an overflowing of the sea or a tidal river; it is a natural event which may in some cases improve the value of land, or it may not. It appears to me that all that has been done in the present case is to enhance the capital value of the land, and that the owner must pay upon the income arising from it, whether small or large, in its present condition. When you come to look at the particular application of this section it is obvious that it could not apply to a case of this kind. Imagine the case of a lord of a manor who held, by ancient grant from the Crown, the foreshore between high and low water-mark, which otherwise would be in the Crown, and who found it worth his while to convert land covered at high tide with water into land which never should be covered with water. He might or might not improve his property by so converting it, but it is clear to my mind that he could not be said to have done it for the preservation or protection of his land. He did it to change the character of that land. It was forcibly put

1887

HESKETH v. BRAY.

Pollock, B.

by the appellant's counsel that the appellant's land had before paid income tax, and that the building of this sea-wall was, therefore, the building of a wall for the preservation or protection of land already subject to the tax against the encroachment or overflowing of the sea. But the answer, I think, is that it is not to be treated as a grant of ancient land which had been protected before because income tax had been paid in respect of it. The tax was paid in respect of the net annual income, and from whatever source that income was derived—whether from mussel or oyster fisheries, or from lobster pots, or from gathering seaweed and selling it for manure, or from saltings upon which cattle were fed during certain portions of the day—the land would not thereby become land for the preservation or the protection of which against the encroachment or overflowing of the sea this sea-wall or embankment was necessary.

Upon these grounds, therefore, it seems to me clear that the deduction claimed cannot be allowed, and that the appeal must be dismissed with costs.

HAWKINS, J. I am of the same opinion. Though I was struck at first with the argument of the appellant's counsel, upon carefully reading s. 37 (which is certainly not easy to construe) with the deduction claimed in the case, I have come to the conclusion that the appellant is not entitled to that deduction.

The allowance or deduction provided by s. 37 is this:—[The learned judge read the section.] Now we must look at the condition of the land when it was first of all assessed to the income tax, because undoubtedly then, as the case finds, it was of the rental value of somewhere between 5*s.* and 10*s.* an acre. At that time it was of comparatively little value, because at every tide the land was covered with water, but such as it was it yielded 5*s.* or 10*s.* per acre, and such as it was it was liable to be assessed, and was assessed, to the income tax. At that time it certainly was not necessary for the preservation or the protection of that land against the encroachment or overflow of the sea that any embankment or sea-wall should have been either made or repaired, though the owner was perfectly at liberty, if he thought fit, to convert it into land of a totally different character and

description; that is to say, if he thought fit, he could improve his own income and enhance the value of his own property by converting that land, which required no protection, into land of a different character by building an embankment to protect it from the encroachment or overflow of the sea. He had the right to convert it into land over which the tide never would flow, but the building of that embankment was only for the purpose of enhancing the value of his property, and certainly not for the purpose of protecting or preserving the land in its then condition from the encroachment or overflow of the sea. He built that embankment for the purpose of making a new and more valuable property of that which had previously been assessed to the income tax. There is no doubt at all that after the embankment was made, and the land became more valuable by reason of it, the Income Tax Commissioners were entitled to assess the land according to its then improved value, precisely in the same way that they would have a right to assess the improved value of a piece of apparently waste land which had been converted into building land. They are entitled to assess the lands to the income tax according to their then value. It was said that the expenditure in converting the land, which was only worth 5*s.* or 10*s.* per acre, into land worth 3*l.* 10*s.* or 4*l.* per acre, was an expenditure which was necessary for preserving or protecting lands assessable to the income tax from the overflow of the tide. There I differ. I have already pointed out that it was not necessary for the lands which were assessed before the improvement that they should have been protected by any embankment or by any sea-wall. After the sea-wall had been built and the enhanced value obtained, the expenditure necessary to maintain the sea-wall in the future in order that the land may be preserved at its present value might be an expenditure necessary for the protection or preservation of the land in its altered condition within s. 37. But whether or not in the future such expenditure as is necessary to preserve the land in its improved and altered condition shall be allowed in assessing it to the income tax is a totally different question from the question whether or not the deduction should be allowed in respect of the expenditure necessary to improve the land itself for the

1887

HESKETH v. BRAY.

Hawkins, J.

purposes of private gain, and for the private interests of the owner.

In my judgment the deduction ought not to be allowed in respect of the expense of making this embankment simply because this embankment was made for the purpose of converting comparatively valueless land, which was overflowed by the tide and required no protection, into land of a much more valuable character, which, when improved in value, did require protection. At the end of another period of expenditure incurred for the purpose of preserving and protecting the land in its new and altered condition, an exemption or deduction may be claimed, and in all probability would be allowed without objection. We are not dealing with that now, but we are only dealing with the question whether any deduction can be allowed in respect of the cost of making the embankment and creating an improved value on the land, which cost was incurred in respect of a private speculation of the owner.

My opinion is that this appeal should be dismissed with costs.

Judgment for the respondent.

Solicitors for appellant: *Torr, Janeway, & Co.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

W. A.

[IN THE COURT OF APPEAL.]

1888
Feb. 23.

THE GUARDIANS OF THE HIGHWORTH AND SWINDON UNION, APPELLANTS, AND THE GUARDIANS OF THE WESTBURY-ON-SEVERN UNION, RESPONDENTS.

Poor Law—Settlement of Child under Sixteen—Derivative Settlement from Father—Retention of such Settlement after Sixteen—Acquisition of another Settlement—Settlement by Residence—Emancipation — Divided Parishes Act, 1876 (39 *&* 40 *Vict. c.* 61), *ss.* 34, 35.

On an inquiry into the settlement of a pauper it appeared that she resided with her father till his death, and then, in the same parish, with her mother, who married again before the pauper arrived at the age of sixteen. After she attained that age the pauper continued to reside in the same parish with her mother and stepfather for two years and eight months, when she became chargeable. She was at that time and always had been physically incapable of work:—

Held, that the effect of s. 35 of the Divided Parishes Act, 1876, is that every child on attaining the age of sixteen is for the purposes of settlement emancipated, and capable of acquiring a settlement, but that the pauper could not while under sixteen "reside" for any part of the period required for a settlement by residence under s. 34, and (reversing the decision of the Queen's Bench Division) that as any settlement acquired by the mother on re-marriage was not communicated to the pauper, and she had not resided after attaining sixteen for three years so as to acquire a settlement by residence under s. 34, she still retained the derivative settlement she had taken from her father while under that age.

CASE stated by consent in an appeal to the Gloucestershire Quarter Sessions against an order of removal, whereby it was adjudged that the last legal settlement of Eliza Wait, a pauper chargeable to the respondent union, was in the parish of Wanborough in the appellant union.

The material facts were as follows:

The pauper, Eliza Wait, was the lawful daughter of Charles and Matilda Wait, and was born in the parish of Wanborough, in the appellant union, on October 27, 1861. The pauper's father, Charles Wait, was also born in the parish of Wanborough.

Charles Wait left the parish of Wanborough about the year 1862, and went, with his wife and the child Eliza, to reside in the parish of Rhydgwern, in the Newport Union, in the county of Glamorgan, and he and they resided there until he died on August 2, 1868.

His widow, with her daughter Eliza, continued to reside at

1888

GUARDIANS OF HIGHWORTH AND SWINDON UNION v. GUARDIANS OF WESTBURY-ON-SEVERN UNION.

Rhydgwern, and in the year 1871 the widow married George Gibbs, and she and her daughter resided with him at Rhydgwern until he died there in the year 1884.

Matilda Gibbs, with her daughter Eliza Wait, continued to reside at Rhydgwern until November, 1885, when she married a third husband, and on Nov. 9, 1885, he with his wife and Eliza Wait went to reside in the parish of Westbury-on-Severn, in the respondent union.

Eliza Wait attained the age of sixteen years on October 27, 1877, and she had resided continuously in the parish of Rhydgwern from 1862 until her second stepfather moved into the parish of Westbury-on-Severn.

On June 5, 1880, she received relief for the first time from the Newport Union, and she continued to receive such relief up to the time of her going with her second stepfather into the parish of Westbury-on-Severn.

The Act 39 & 40 Vict. c. 61, came into force on August 15, 1876, so that Eliza Wait had resided in the parish of Rhydgwern for more than three whole years after that date until she became chargeable on June 5, 1880, namely, one year and two months whilst under sixteen years of age, and two years and eight months after she attained that age.

On September 21, 1886, she became chargeable to the respondent union, and on March 18, 1887, the guardians of that union obtained an order from two justices of the county of Gloucester for her removal to the appellant union, on the ground that the parish of Wanborough was the birthplace and last legal settlement of her father and herself.

The case found "that the said Eliza Wait is now residing with, and has always resided with, her mother, and is now, and always has been, physically incapable of work."

1887. Nov. 22. *R. Cunningham Glen*, for the appellant union. It is contended that the pauper, Eliza Wait, gained a settlement under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (1), by reason of her residence for three years, under

(1) 39 & 40 Vict. c. 61, s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be

the circumstances stated in the case, in the Newport Union. She could not gain any derivative settlement from her father because he died before she became chargeable. Children are "persons" within s. 34, and they can acquire a settlement under that section by residence though under sixteen: *Reg.* v. *Leeds Union* (1); *Woolstanton and Burslem Union* v. *Northwich Union* (2); *Guardians of Holborn* v. *Guardians of Chertsey* (3) (reversed by the Court of Appeal, but on different grounds (4)), and *Guardians of St. Pancras* v. *Guardians of Norwich Incorporation* (5), judgment of Denman, J., at p. 526. It may be contended that the pauper in question was unemancipated, and that unemancipated children follow the parents' settlement, but s. 35 has the effect of emancipating children at the age of sixteen, and *Reg.* v. *Elvet* (6) is an authority that an unemancipated child living with its father may obtain a status of irremovability under 9 & 10 Vict. c. 66, and does not follow the father's settlement. The order of the justices in the present case was therefore wrong.

Fraser Macleod, for the respondent union. It is contended that the pauper in question, being physically incapable of work, could not acquire a settlement in her own right. An unemanci-

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settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court think sufficient."

Sect. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(1) 4 Q. B. D. 323.
(2) 46 L. T. (N.S.) 528.
(3) 14 Q. B. D. 289.
(4) 15 Q. B. D. 76.
(5) 18 Q. B. D. 521.
(6) 2 E. & E. 266.

1888

GUARDIANS OF HIGHWORTH AND SWINDON UNION v. GUARDIANS OF WESTBURY-ON-SEVERN UNION.

pated child, before the passing of the Divided Parishes Act, could never gain a settlement, but was always relegated to its father's settlement: *Rex* v. *Inhabitants of Much Cowarne* (1); *Reg.* v. *St. Olaves.* (2) In *Guardians of Salford* v. *Overseers of Manchester* (3), Hawkins, J., said (at p. 176): "In the case of a legitimate child the liability of its parents to maintain it is not limited to the age of sixteen, but extends to an indefinite period, if the child, whether from imbecility of mind or infirmity of body, is unable to maintain or provide for itself: so long as it remains an unemancipated member of its father's family, no matter what its age may be, it follows and takes in law its father's settlement, and it gains no independent status by reason of any residence in a parish, so long as such residence is merely as a member of its father's family; and its right to take such newly acquired settlement of its father's ceases only upon its becoming emancipated, or acquiring a new settlement for itself." Those observations directly apply to the present case. In *Reg.* v. *Elvet* (4) part of the residence was after emancipation, and the only effect of that decision was that the period of residence before emancipation could be tacked on to that part. Here the father being dead, his settlement has gone; the mother has gained no settlement which the child could derive, and the child must, therefore, go back to its birth settlement in the appellant union.

R. Cunningham Glen, in reply. The judgment of Hawkins, J., in *Guardians of Salford* v. *Overseers of Manchester* (3) was right so far as it applied to the particular case, which was that of an illegitimate imbecile child. If the learned judge's observations are to be taken as having a general application, they are inconsistent with the opinion he expressed in *Guardians of Holborn* v. *Guardians of Chertsey.* (5)

STEPHEN, J. This case, following as it does upon our decision in *Guardians of Poor of Amersham Union* v. *Guardians of Poor of City of London Union* (6), is not difficult to decide. We have to consider what was the position of the pauper on September 21, 1886, when she became chargeable to the respondent union.

(1) 2 B. & Ad. 861.
(2) Law Rep. 9 Q. B. 38.
(3) 10 Q. B. D. 172.
(4) 2 E. & E. 266.
(5) 14 Q. B. D. 289, at p. 294.
(6) 20 Q. B. D. 103.

Had she, or had she not, at that time gained a settlement of her own? I think she had. After she attained the age of sixteen she had resided for more than three years with her mother and stepfather in the parish of Rhydgwern, and I am of opinion that she had resided there in such manner and under such circumstances in each of the three years as would render her irremovable in accordance with the statutes referred to in s. 34 of the Divided Parishes Act. It was argued that she had not become irremovable by reason of such residence because the statute does not apply to unemancipated children. Now it is not found as a fact in the case that this child was unemancipated. It is stated that she always resided with her mother, and had always been physically incapable of work, but a physical incapacity for work is not of itself necessarily clear proof of unemancipation. Apart from that question I think that the effect of s. 35 is to materially alter the law with respect to these matters. The settlement of the pauper's father, and of her mother had gone when she became chargeable, and we must consider whether she had acquired any settlement of her own, or whether she must be relegated to her birth settlement. There is certainly some difficulty in reconciling the expressions of Hawkins, J., in *Guardians of Salford* v. *Overseers of Manchester* (1), with those he used in *Guardians of Holborn* v. *Guardians of Chertsey* (2). It is not necessary to enter minutely into a discussion on that matter, but perhaps the explanation given by the appellant's counsel may reconcile them, namely, that the judgment in the first of those cases was right as applied to the facts of that case. But in *Reg.* v. *Elvet* (3), which has not been successfully distinguished in principle from the present case, all the three judges who composed the Court held that when the order for removal was made, the pauper had acquired a status of irremovability by residence with her father. It appears to me that upon the same principle this pauper had acquired a status of irremovability when the order for removal was made, although she had shared, with her mother, the house of her stepfather.

CHARLES, J. I am of the same opinion. The pauper resided with her parents at Rhydgwern from 1862 to 1868, when her father

(1) 10 Q. B. D. 172. (2) 14 Q. B. D. 289. (3) 2 E. & E. 266.

1888

GUARDIANS OF HIGHWORTH AND SWINDON UNION v. GUARDIANS OF WESTBURY-ON-SEVERN UNION.

Charles, J.

died, and she resided with her mother in the same parish from 1868 to 1871, when her mother married again. From 1871 to 1880 she resided in the same place with her mother and step-father, and in 1880 she first received relief from the Newport Union. Under those circumstances I am of opinion that she had acquired a status of irremovability. It was argued that she had not, because she was unemancipated. Assuming that she was, I think that, although unemancipated and living with her parents, *Reg.* v. *Elvet* (1) is decisive that she could acquire a status of irremovability. If that be so, she resided long enough in the parish of Rhydgwern to come within s. 34 of 39 & 40 Vict. c. 61. There were, no doubt, some expressions in the judgment of Hawkins, J., in *Guardians of Salford* v. *Overseers of Manchester* (2) to the effect that a pauper cannot gain a status of irremovability by residence in the father's family, but in *Guardians of Holborn* v. *Guardians of Chertsey* (3) it is said that the residence contemplated by s. 34 is accomplished although it is a residence with the pauper's parents only. I think that the expressions of Hawkins, J., in his judgment in the former case may be explained as the counsel for the appellants suggested. I am of opinion that there should be judgment for the appellants.

W. A.

The respondents appealed.

1887. Jan. 21. *H. D. Greene*, Q.C., and *Fraser Macleod*, in support of the appeal.

Lumley Smith, Q.C., and *R. Cunningham Glen*, contrà.

The following cases were cited in addition to those already referred to: *Reg.* v. *Inhabitants of Glossop* (4), *Reg.* v. *St. Anne, Blackfriars* (5), *Reg.* v. *Overseers of St. Giles-in-the-Fields* (6), *Reg.* v. *Inhabitants of St. Leonard, Shoreditch* (7), *Overseers of Easton* v. *Overseers of St. Mary, Marlborough* (8), *Reg.* v. *Overseers of Manchester* (9).

Cur. adv. vult.

(1) 2 E. & E. 266.
(2) 10 Q. B. D. 172.
(3) 14 Q. B. D. 289.
(4) 12 Q. B. 117.
(5) 22 L. J. (M.C.) 137.
(6) 30 L. J. (M.C.) 12.
(7) 6 B. & S. 784.
(8) Law Rep. 2 Q. B. 128.
(9) 8 Q. B. D. 50.

1888

GUARDIANS OF HIGHWORTH AND SWINDON UNION v. GUARDIANS OF WESTBURY-ON-SEVERN UNION.

1888. Feb. 23. The judgment of the Court (Lord Esher, M.R. Fry and Lopes, L.JJ.), was read by

LOPES, L.J. This case raises important questions under the Divided Parishes Act, 1876. To make our judgment intelligible it is necessary to state some of the material facts and dates.

The order of removal was made on March 18, 1887.

The pauper, Eliza Wait, is the lawful daughter of Charles and Matilda Wait, and was born October 27, 1861, in the parish of Wanborough, in the appellant union. Charles Wait was born in the same parish. In 1862 the father and mother with the pauper left Wanborough, and went to reside in the parish of Rhydgwern, in the county of Glamorgan, in the Newport Union.

The father died at Rhydgwern about August 2, 1868. The mother and the pauper continued to reside at Rhydgwern, and in 1871 the widow married George Gibbs, and they continued to reside with him until he died in 1884.

The mother married her present husband, James Woodman, in November, 1885, and they with the pauper resided in Rhydgwern until November 9, 1885, when they went to reside at Adsett, in the parish of Westbury-on-Severn, in the Westbury-on-Severn Union, in the county of Gloucester, the respondent union.

On September 21, 1886, the pauper became chargeable to the respondent union, whereupon the order of removal was made, whereby it was adjudged that the last legal settlement of Eliza Wait was in the parish of Wanborough, in the appellant union.

On October 27, 1877, the pauper attained the age of sixteen. She was in receipt of relief from the Newport Union from June 5, 1880, up to the time of her going to Adsett on November 9, 1885. She is now residing with, and always has resided with, her mother, and now is and always has been physically incapable of work.

It is to be assumed that the pauper, being physically incapacitated, would have been regarded as unemancipated before the Divided Parishes Act, 1876. It is also a fact that she resided with her mother in Rhydgwern from 1862 to June 5, 1880, without having received relief.

The Divisional Court decided in favour of the appellants, holding that the pauper had acquired a settlement in Rhydgwern. Against this decision the respondents appeal.

1888

GUARDIANS OF HIGHWORTH AND SWINDON UNION v. GUARDIANS OF WESTBURY-ON-SEVERN UNION.

Lopes, L.J.

In our opinion the case is governed by the Divided Parishes Act, 1876, ss. 34 and 35. It will be necessary, therefore, carefully to consider these two sections.

Sect. 35 abolishes all derivative settlements except the derivative settlement that a wife may take from her husband and a child under sixteen may take from its father, if alive, or from his widow after his death, if she has acquired a settlement in her own right between the time of the death of the father and the child's attaining sixteen.

Previously to the passing of this statute great expenses were often incurred by parishes in tracing remote derivative settlements and difficult steps in family pedigrees; and it was with a view to obviate this mischief that the 35th section was introduced into the Act, which at a stroke prohibits any question of a derivative settlement being entered upon beyond the two derivative settlements expressly mentioned: see *Reg.* v. *Guardians of Bridgnorth.* (1) But the provision with regard to the child is most important. It is only while the child is under sixteen that it is to be capable of taking the derivative settlement of the father or widowed mother; any settlement acquired by the parents after the child attains sixteen is not to be communicated to the child, but the child is to retain the derivative settlement it had when it attained sixteen until it acquires another.

The language in the latter part of s. 35 is clear and distinct. It declares that every child under the age of sixteen "shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." The legislature hereby positively enacts what settlement a child shall take and hold up to sixteen, and until it acquires another. The settlement of every child before sixteen and until it acquires another, is definitely fixed and determined by the latter part of s. 35. There is no qualification or limitation to the word "child," and we think that the doctrine of emancipation as it existed before 1876 can no longer prevail, and that every child on attaining the age of sixteen, whether such child continues a member of its father's family or not, and whether mentally or physically incapable or

(1) 11 Q. B. D. 314.

not, is for the purposes of settlement emancipated, and is rendered capable of acquiring a settlement for itself.

Adopting this view of s. 35, we have now to consider what the position of the pauper was on October 27, 1877, when she attained sixteen.

The father died in 1868. Up to that time she took his settlement, which was in Wanborough, in the appellant union, which settlement she would retain up to sixteen, unless her mother in the interval, whilst a widow, acquired a settlement in her own right, when she would take that settlement up to sixteen, and retain it until she acquired another.

The mother never acquired a settlement in her own right. She was twice married, and would on each occasion take her husband's settlement. Under the law before the Divided Parishes Act the mother's settlement so acquired would not have been communicated to the pauper, and under the 35th section of the statute the same result, in our opinion, follows, because on the second marriage of the pauper's mother she ceased to be a widowed mother, and consequently her settlement by such second marriage would not be communicated to her child. Therefore, under the provisions contained in s. 35, the pauper would retain her father's settlement in Wanborough until she acquired another.

Has she acquired another? It is said that she has acquired a settlement in Rhydgwern by three years' residence under s. 34 of the Divided Parishes Act.

To have acquired this settlement she must have resided in Rhydgwern for the term of three years in such a manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render her irremovable. But this must mean a residence after she attained sixteen, because up to that time she took her father's settlement, and retained it until she acquired another. The pauper, in fact, has not resided in Rhydgwern so as to gain a settlement there since she attained sixteen, because attaining sixteen on October 27, 1877, she was in receipt of relief on June 5, 1880, and continued in receipt of relief up to November 9, 1885, when she went to Adsett, where, on September 21, 1886, she became chargeable.

We are of opinion, therefore, that the pauper has not acquired

1888

GUARDIANS OF HIGHWORTH AND SWINDON UNION v. GUARDIANS OF WESTBURY-ON-SEVERN UNION.

a settlement in Rhydgwern, but is settled in Wanborough, in the appellant union, the place of her father's last legal settlement. The decision of the Court below must be reversed, and this appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Few & Co., for J. E. G. Bradford, Swindon.*

Solicitors for respondents: *Wilkins, Blyth, & Dalton.*

A. M.

March 1.

[IN THE COURT OF APPEAL.]

BOURNE AND ANOTHER *v.* THE NETHERSEAL COLLIERY COMPANY, LIMITED.

Mine—Wages—Payment by Weight of Mineral—Mode of determining Deductions—Mineral contracted to be gotten—Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 17.

By the Coal Mines Regulation Act, 1872, s. 17, where the amount of wages paid to persons employed in a mine to which the Act applied depends on the amount of mineral gotten by them, such persons are to be paid according to the weight of the mineral gotten by them, subject to deductions in respect of, among other things, "stones or materials other than minerals contracted to be gotten," such deductions to be determined by the banksman or weigher and check-weigher (if there be one).

The plaintiffs worked in the defendants' colliery under a contract which declared that the "mineral contracted to be gotten" should be coal of a certain size, which was to be paid for at 1*s.* 6*d.* per ton, that heading slack should be paid for at 7*d.* per ton, and that no other slack should be paid for. The coal was weighed close to the pit's mouth in the presence of the weigher and check-weigher, and was then carried to a distance and thrown on a screen, and the weight of the slack which passed through the screen was ascertained by a person in the defendant's employ. Wages were paid according to the weight of the coal as ascertained at the pit's mouth after deducting therefrom the weight of the slack which had gone through the screen.

In an action to recover the difference between the wages so ascertained and wages computed on the full weight of coal taken by the check-weigher at the pit's mouth:—

Held (by Lord Esher, M.R., and Lopes, L.J., Fry, L.J., dissenting), that the mineral contracted to be gotten within the meaning of the statute was coal, and that slack being a part of such coal deductions in respect of it were unauthorized; that so much of the contract as related to such deductions was void and that the plaintiffs were entitled to recover.

APPEAL from the judgment of the Queen's Bench Division, reported 19 Q. B. D. 357.

1888

BOURNE v. NETHERSEAL COLLIERY CO.

The plaintiffs were employed in the defendants' colliery. The action was brought to recover a sum of money for wages earned by the plaintiffs by getting coal for the defendants. The plaintiffs also claimed the same amount as having been illegally and improperly deducted from their wages by the defendants, without the assent of their check-weigher at the colliery, and against the provisions of the Coal Mines Regulation Act, 1872. (1)

The plaintiffs were employed under an agreement which contained a clause that "the mineral contracted to be gotten, referred to in the Coal Mines Regulation Act, 1872, shall in all cases mean and include only such pieces of clean coal as cannot fairly be passed through an ordinary loading rake, the clear spaces between the prongs of which are two and a half inches wide." The following was the subsisting agreement as to payment: "Main coal. It is agreed that coals sent from the stalls and headings shall be paid for at 1*s.* 6*d.* per ton and heading slack 7*d.* per ton, all other prices as at present paid to remain in

(1) 35 & 36 Vict. c. 76. By s. 17: "Where the amount of wages paid to any of the persons employed in a mine to which this Act applies depends on the amount of mineral gotten by them; such persons shall, unless the mine is exempted by a Secretary of State, be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly.

"Provided always, that nothing herein contained shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him, such deduction being determined by the banksman or weigher and checkweigher (if there be one), or in case of difference by a third party to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other. . . .

"If any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with, this section, he shall be guilty of an offence against this Act."

By s. 18: "The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a checkweigher') at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed."

1888

BOURNE v. NETHERSEAL COLLIERY CO.

operation. A premium of 2*d.* per ton on the coal will be paid to all those places whose boxes of coal do not contain an average of more than 112 pounds of dust each per week. No slack whatever will be paid for except that sent out as heading slack. All other slack will be deducted from the different places in proportion to their loading."

The following facts with regard to the weighing and deductions appeared on the county court judge's notes:—

The coal was put into tubs in the pit, and the tubs were then put on a tramway and carried to the pit's mouth, where they were hoisted to the surface, unhooked, and wheeled along rails to a weighing machine three yards from the unhooking point. At the weighing machine was an office occupied by the weigher and the check-weigher. The coal was then weighed, and the weights were taken down by the weigher and check-weigher. The coal was then moved on trucks along a tram line to a place where it was sorted into classes, and after it had been sorted the trucks were taken to a place forty yards distant from the office of the weigher and check-weigher, where the coal was shot down six feet on to a screen forming part of a machine called "Billy Fairplay," and a boy, who was only in the employ of the company, noted from a dial the weight of slack that had gone through the screen. At the end of the week the check-weigher handed to the men the weights, so as to guide them in the amount of wages to be received. When the men went to the cashier they received the pay tickets, shewing the amount of weight upon which they were entitled to wages, and their wages. The amount of weight shewn on the pay tickets was less than the amount of the weights given to the men by the check-weigher, the weight of the slack which had gone through the screen of "Billy Fairplay" being deducted. The company had advised the men to appoint another check-weigher to attend "Billy Fairplay," and offered to pay him themselves, an offer which the men did not accept.

The county court judge gave judgment for the defendants, and the plaintiffs appealed to the Queen's Bench Division, when the appeal was allowed, and judgment was given for the plaintiffs for the amount claimed. (1) The defendants appealed.

(1) 19 Q. B. D. 357.

1888

BOURNE v. NETHERSEAL COLLIERY CO.

Rigby, Q.C., and *MacClymont*, for the defendants. It is submitted that the deductions made in respect of slack were allowable, or that if not the plaintiffs have no right of action. The mineral contracted to be gotten is clean coal, free from slack which can only be sold at a loss, and in respect of which deductions may be made under s. 17, as coming within the expression "materials other than minerals contracted to be gotten": *Hynd* v. *Spowart* (1). The deductions are to be ascertained by the banksman and check-weigher (if there be one). That is, the check-weigher appointed for that purpose. This is in effect the same as the provision in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 12, though the latter is more fully expressed in the words "if any check-weigher is stationed for this purpose as hereinafter mentioned." Even assuming that the deductions were not made in the manner provided by the Act that gives no right of action to recover them contrary to the terms of the agreement as to payment.

Alfred Young, for the plaintiffs. The deductions were not determined in accordance with the provisions of the Act, which directs that they are to be determined by the check-weigher (if any). Here there was a check-weigher, but he had no control over the deductions. The mineral which was being gotten was coal, and small coal cannot be properly described as "material other than mineral contracted to be gotten." It follows then that deductions for small coal are illegal, and so much of the contract as refers to such deductions must be rejected, and the action is rightly brought.

Rigby, Q.C., in reply.

LORD ESHER, M.R. It seems to me that the first thing to be done is to construe the contract, and in doing so it is right to take into consideration the law at the time it was made. It was made after the passing of the Act and with direct reference to it, for the contract itself shews that the section must have been in the minds of the parties who made the contract. It is a contract that the coal sent from the stalls and headings shall be paid for at 1*s.* 6*d.* per ton and heading slack at 7*d.* The agreement then

(1) 22 Scottish Law Rep. 702.

1888

BOURNE v. NETHERSEAL COLLIERY CO.

Lord Esher, M.R.

stipulates for a premium of 2*d.* per ton when there is only a certain percentage of dust. This is a premium to stimulate the men to make as little slack as possible, but it does not interfere with the former contract to pay the given price for coal from the stalls and headings. Then there is a clause that no slack will be paid for except that sent out as heading slack, and that all other slack will be deducted from the different places in proportion to their loading. It seems to me that this is an endeavour to give a meaning to the words in the statute as to deductions which those words, according to their ordinary meaning, will not bear. If it is true, as was suggested, that this Act was not intended to interfere with freedom of contract, then the men have bound themselves, and would have to perform their part of the agreement. But I think it clear, with great respect for the opinion of Lord M'Laren in *Hynd* v. *Spowart* (1), that the object of the statute was to limit freedom of contract. I do not think that a contract which is in some parts inconsistent with the Act is altogether illegal; my view is that where such a contract is made the Act makes not the contract but so much of it as relates to the deductions, void. It seems to me that the section contains a positive enactment that if wages are to depend on the amount of mineral gotten, then the only measure of the amount of the wages is the weight of the mineral gotten. But those who drew the Act wished that there should be power to make some deductions, and they specified the cases in which this might be done, namely, where stones are brought up or materials other than mineral contracted to be gotten, or in respect of tubs, baskets, or hutches improperly filled where they are filled by the getter of the mineral, or his drawer, or some person immediately employed by him. If it were not for this proviso, no deductions could be made, and no deductions can be made except those expressly mentioned. The mineral contracted to be gotten is the mineral the men are employed to get, and if they are employed to get coal, such things as clay or ironstone would be matters about which deductions might be agreed to. Construing the contract as I do, it is an agreement to get coal, and slack is a part of the mineral contracted to be gotten, and the stipula-

(1) 22 Scottish Law Rep. 702.

tions with regard to deductions for slack are not authorized. It seems to me that the parties themselves so understood the matter from the fact that the whole of the coal, whether clean coal or slack, was weighed at the mouth of the pit. The coal was sent on from that spot, and sorted and divided into clean coal of a certain size and slack, and then by the amount of the latter the deductions were determined. I am of opinion these are deductions that are not allowable, because slack is part of the mineral contracted to be gotten. The contract must, therefore, be carried out without the deductions, and the men are entitled to be paid the full price.

Two cases have been relied on, the principal of which is the Scotch case to which I have referred. I cannot agree with the conclusion of the Lord Ordinary in that case. In my opinion, the contract in such a case as the present does not become illegal altogether because the deductions agreed on are not authorized, but that part of it must be rejected. There seems to me to be nothing in the statute to authorize the statement that the spirit of the Act was that the miner should be paid for saleable coal. I do not see what the miner has to do with the market, and I cannot follow that case and hold that the men are not employed to get the dross, or, as it is called in this case, "slack," as part of the mineral contracted to be gotten. In my judgment, directly it is shewn that the case is within the section, and deductions are claimed by the owner, it lies on him to shew that the coals were weighed according to the terms of the Act so as to justify the deductions. In that view it seems to me that in this case the place of weighing fixed was the pit's mouth, and until that was altered the weight could not be ascertained at any other place, whether in presence of any one on behalf of the men or not. The effect, therefore, is that there was a weighing to ascertain the whole amount of the coal, but none which entitled the owner to make any deductions. The appeal will therefore be dismissed.

FRY, L.J. I have the misfortune to differ from the rest of the Court. We are bound to look at the statute and learn from it what were the evils which the legislature had in view to remedy, and what was the form of the remedy which it was intended to introduce. From the enactment I should gather that there were

1888

BOURNE v. NETHERSEAL COLLIERY CO.

FRY, L.J.

two evils in contemplation, one that where wages were paid according to the amount of mineral gotten the measurement was made by yard or foot measure or by gauge, or some other way than by weight, and the correctness of that mode of measurement might be liable to dispute, and so it became desirable to make measurement by weight compulsory. Then, again, though the employers might be perfectly honest in their dealings, suspicions might arise where their measurements were unchecked, and it was desirable to guard against this. In the next place it is fitting to consider what modes of arriving at the amount of wages were or might have been in vogue. Payment might have been made according to the time occupied by the labourers over their work, or a payment might be fixed on the co-operative principle, the amount being arrived at more or less directly in proportion to the profits of the concern. Then, again, the determination of the wages might depend on the amount of mineral sold or the total amount gotten, or on the percentage of metal or a particular class of mineral contained in what was brought to bank. Now the statute does not deal with all these modes of ascertaining the wages to be paid, nor does it create a statutory form of contract, it only deals with a particular mode of paying wages, viz., when the wages depend on the amount of mineral gotten by the workmen, and says that when that mode exists certain consequences shall follow. Is this, then, such a case as the section deals with? The mineral gotten by the miners is the whole quantity of coal brought to bank, whether it ultimately assumed the form of large coal or of slack, but the contract appears to me to amount to this, that, instead of being paid for the amount of coal gotten, the miners agree that they shall be paid for that portion of the coal which ultimately remained as large coal at the rate of 1*s.* 6*d.* per ton, for a particular portion of the slack at the rate of 7*d.* per ton, and that all other slack should not be paid for. The total amount of mineral gotten was divided into three kinds, of which two were to be paid for and one was not. The result is that instead of the wages depending on the amount of mineral gotten they were to depend on a particular part of the mineral gotten.

It appears to me that although the word "deduction" is used in the contract of July, 1886, it is so used for the purpose of

shewing how the slack is to be dealt with: "All other slack will be deducted from the different places in proportion to their loading." That is the mode of distributing the slack among the stalls. Though therefore the contract is said to contemplate the making of deductions from the wages arrived at by weight, I do not think that is the right view, but the one I have already expressed, that the contract is in substance to pay wages according to the amount of a particular part of the mineral gotten. In my judgment such a contract is not in any way affected by s. 17.

I cannot help observing that in my judgment we should not turn enactments which deal with a particular contract into enactments avoiding all other contracts. To my mind the construction put on the section in the Court below and by the Master of the Rolls is not exact. There is one other point to be noticed, and that is that even if my view is wrong, I do not see how the men can be entitled to be paid at the rate of 1*s.* 6*d.* per ton for slack in respect of which they stipulate that they shall receive nothing. If they are to be paid at all independently of the contract I should have supposed it would be by a quantum meruit on the quantity gotten, and I cannot see why 1*s.* 6*d.* should be taken as the price and not 7*d.*

LOPES, L.J. I have arrived at the same conclusion as the Master of the Rolls. It is important to consider what object the legislature had in view in making this enactment. It is not possible to extract any particular mineral from a mine without bringing out other materials, and this causes a great expenditure of labour. This is particularly the case with coal mines, where slack is produced at each process, not only in extracting the coal from the mine but also in transporting it. I am of opinion that the legislature intended to interfere with freedom of contract in order to secure adequate remuneration where the miners are paid by the amount of mineral gotten as distinguished from cases where they are to be paid by time or by piece work. It is clear they would not be adequately remunerated for mineral actually gotten unless they were paid on the gross amount extracted.

It is necessary to consider therefore whether this case can be brought within the purview of s. 17. In my opinion directly the

1888

BOURNE v. NETHERSEAL COLLIERY CO.

LOPES, L.J.

wages or method of payment are made to depend on the amount of coal gotten the case comes within that section, the words of which are clear.

Now, what is the construction of this agreement? Bearing in mind that it is an agreement made after the passing of the Act, and with reference to it, I think it is an agreement by which the employer agrees to pay and the men agree to receive 1*s.* 6*d.* per ton for the coal gotten, including the slack. Now if the s. 17 had stopped at the end of the first paragraph it would have been necessary to say nothing more, but the legislature clearly thought there were cases where deductions ought to be made, and in the next part of the section great care is taken to specify in respect of what the deductions may be made, namely, stones or materials other than minerals contracted to be gotten. The deductions in this case are made in respect of slack, which comes within neither of these descriptions. The mineral contracted to be gotten is coal, and slack is a portion of that mineral, and therefore, in my opinion, the deductions in respect of the slack are not authorized by the section. The Divisional Court, however, did not decide the case upon this point, but upon another point, that assuming the deductions were authorized they were not properly ascertained, I think the Divisional Court were right, although, having regard to the view I have expressed on the first point, it is not necessary for the purposes of this case to decide this other point. I am unable to agree with the decisions in the two cases which have been mentioned.

A point was made with regard to the penalty clauses. I think it is unnecessary to consider what the proper construction of these clauses may be, because I cannot see that the construction contended for would in any way interfere with the plaintiffs in this action recovering that which they seek to recover. I am of opinion therefore with the Master of the Rolls that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Deane & Hands, Loughborough.*

Solicitors for defendants: *Morten, Cutler & Co., for Challinor & Co., Leek.*

A. M.

[IN THE COURT OF APPEAL.]

1888
March 15.

BETHELL & CO. *v.* CLARK & CO.

Sale of Goods—Stoppage in transitu—Goods bought for Shipment Abroad—Delivery of Goods on board Ship—Termination of Transit.

Goods having been purchased by merchants in London of manufacturers in Wolverhampton, the purchasers wrote to the vendors asking them to consign the goods "to the *Darling Downs*, to Melbourne, loading in the East India Docks." The goods were accordingly delivered by the vendors to carriers to be forwarded to the ship. The vendors being subsequently informed of the purchasers' insolvency gave notice to the carriers to stop the goods, but too late to prevent their shipment on board the *Darling Downs*. The ship sailed with the goods on board for Melbourne, but before she arrived the vendors claimed the goods from the shipowners as their property :—

Held, affirming the judgment of the Queen's Bench Division, that the transit was not at an end till the goods reached Melbourne, and therefore that the vendors had till then a right to stop them in transitu.

APPEAL from the judgment of the Queen's Bench Division on a special case.

The facts are fully stated in the report of the case in the court below (19 Q. B. D. 553). For the purposes of this report they may be briefly stated as follows :—The special case was stated on interpleader proceedings to determine the title to the possession of certain goods. The goods had been sold by Clark & Co., ironfounders at Wolverhampton, to Tickle & Co., of London. The order for the goods did not specify any place to which they were to be sent, but on June 28, 1885, the purchasers wrote the vendors as follows : "Please consign the ten hogsheads of hollow ware to the *Darling Downs*, to Melbourne, loading in the East India Docks here." The goods were delivered by the vendors to the London and North Western Railway Company, to be forwarded to the ship. They were accordingly sent by railway to Poplar, and taken thence to the ship in lighters by the Thames Steam Tug and Lighterage Company, as agents of the railway company, a mate's receipt being taken for them on shipment, which was forwarded to the purchasers. The vendors being informed that the purchasers were insolvent gave notice to the railway company to stop the delivery of the goods on board the ship ;

1888

BETHELL [v. CLARK.

and the railway company gave a similar notice to the lighter company, but too late to prevent the shipment of the goods on the *Darling Downs*. Bills of lading for the goods in accordance with the mate's receipt had been made out and signed ready for delivery, but, not having been applied for at the time, they remained in the possession of Bethell & Co., the owners or agents for the owners of the *Darling Downs*, who were stakeholders in the interpleader. Shortly after the shipment the *Darling Downs* proceeded to Melbourne with the goods on board, but before she arrived at Melbourne the vendors wrote to the shipowners claiming the goods as their property. A petition in bankruptcy having been filed by the purchasers of the goods, a scheme of arrangement was sanctioned by the creditors, and a trustee appointed to administer their estate and effects. The goods being claimed by such trustee and also by the vendors, the shipowners interpleaded. The question for the Court was whether the trustee or the vendors were entitled to the possession of or property in the goods.

The Court below (Mathew and Cave, JJ.) gave judgment for the vendors on the ground that the right of the vendors to stop the goods in transitu continued till they arrived at Melbourne.

Willis, Q.C., and *G. E. Lyon*, for the trustee. The right to stop in transitu was determined when the goods had been put on board the ship. The transit of the goods as between the vendors and vendees was then at an end. The words "to Melbourne" in the letter of June 28, were merely descriptive of the particular ship. After the goods reached the *Darling Downs*, it would depend on the orders to be given by the vendees to the shipowners what was to be done with them, and what their ultimate destination would be.

[They cited *Ex parte Miles* (1); *Kendal* v. *Marshall Stevens & Co.* (2); *Ex parte Watson* (3); *Valpy* v. *Gibson* (4); *Dixon* v. *Baldwen* (5).]

R. T. Reid, Q.C., and *C. C. Plumptre*, for the vendors, were not called upon.

(1) 15 Q. B. D. 39.
(2) 11 Q. B. D. 356.
(3) 5 Ch. D. 35.
(4) 4 C. B. 837
(5) 5 East, 175.

1888

BETHELL v. CLARK.

LORD ESHER, M.R. In this case the vendors being unpaid and the purchasers having become insolvent, according to the law merchant the vendors had a right to stop the goods while in transitu, although the property in such goods might have passed to the purchasers. The doctrine of stoppage in transitu has always been construed favourably to the unpaid vendor. The rule as to its application has been often stated. When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this: where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage in transitu exists: but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are in transitu afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at end when they have reached that place, and any further transit is a fresh and independent transit. The question is, under which of these heads the present case comes. In this case the contract does not determine where the goods are to go. It is argued for the vendors that directions were given by the purchasers to the vendors that the goods should be forwarded by carriers to Melbourne, so that while they were in the hands of any of the different sets of carriers who would necessarily be employed in so forwarding them, and until they arrived at Melbourne, they were still in transitu. The question, whether that is so, is a question of fact in the particular case. The goods were purchased at

1888

BETHELL v. CLARK.

Lord Esher, M.R.

Wolverhampton, and, after the contract was made, the purchasers gave directions once and once only as to what was to be done with them. It was argued that those directions were to deliver them on board a particular ship in the East India Docks, and that there were no directions beyond the directions for such delivery, but that a fresh direction as to the ultimate destination of the goods would be required; and therefore the original transitus was at an end when the goods were put on board the ship. That question turns on the true construction of the letter of June 28, which says "Please deliver the ten hogsheads of hollow ware to the *Darling Downs*, to Melbourne, loading in the East India Docks here." The argument really amounted to saying that the meaning was that the goods were to be delivered on board the ship to be kept by those in charge of her as in a warehouse, and subject to orders from the purchasers either to deliver the goods back again out of the ship or to take them on where the ship was going. That cannot be the business meaning of the transaction. Here we have a ship loading in the docks for Melbourne, and the captain would have no authority to receive goods on board as a warehouseman, or for any purpose but to be carried to Melbourne. The meaning is that the goods were to be delivered on board to be carried to Melbourne. What would be the mode in which they would be so delivered? They would be put on board and the mate's receipt would be taken for them, the terms of which would shew that the goods were received for carriage to Melbourne, and a bill of lading would afterwards be signed in the terms of such receipt. That is what was done here.

It follows, in my opinion, that those goods were in the hands of carriers as such, and in the course of the original transitus from the time they left Wolverhampton till they reached Melbourne. The case therefore falls within the doctrine of stoppage in transitu, and is not within the class of cases where, goods going through the hands of a number of carriers, at some stage in the process fresh directions are required from the purchaser as to further carriage. Here no such further directions were required. The letter of June 28 gives all the directions necessary for the transit to Melbourne. It is not necessary to refer to all the authorities cited. The argument of the counsel for the trustee is

directly met by what was said by Bowen, L.J., in *Kendal* v. *Marshall Stevens, & Co.* (1) He there says: "Where goods are bought to be afterwards dispatched as the vendee shall direct, and it is not part of the bargain that the goods shall be sent to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination. In *Coates* v. *Railton* (2) several cases were cited by Bayley, J., in the course of his judgment, and the principle to be deduced from them is, that where goods are sold to be sent to a particular destination, the transitus is not at an end until the goods have reached the place named by the vendee to the vendor as their destination." In *Ex parte Miles* (3) I cited the test laid down by Lord Ellenborough in *Dixon* v. *Baldwen* (4) where he says, "the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary;" and, applying that rule to the case then before me, I held that the goods had in that case got to the end of their journey when they arrived at Southampton. That would not be the case here; when the goods were put on board the ship, they would be in motion without any fresh orders being necessary until they reached Melbourne. Therefore, in my opinion, the right to stop in transitu still existed, and was rightly exercised by the vendors. I think the decision of the Court below was correct, and that this appeal must be dismissed.

FRY, L.J. I am of the same opinion. The delivery relied on here as putting an end to the transit is a constructive delivery, i.e. a delivery to the agents of the vendees. Nothing is clearer than that it is not delivery to any agent which terminates the transit. If the delivery be to an agent to hold for the vendee or to await further instructions for the dispatch of the goods, then, no doubt, the transit is at an end; but where it is only to an agent or agents whose sole duty it is to transmit the goods, then, however many agents' hands the goods pass through, while they

(1) 11 Q. B. D. 356, at p. 369.
(2) 6 B. & C. 422.
(3) 15 Q. B. D. 39.
(4) 5 East, 175.

1888

BETHELL v. CLARK.

Fry, L.J.

are in the hands of any of such agents, the transitus continues. I will only refer to one authority on the subject, viz. *Berndtson* v. *Strang* (1), where Lord Hatherley very clearly explains the cases in which delivery on board a ship will have the effect of actual delivery to the purchasers, and those in which it will not have that effect. He there says: "In the ordinary case of chartering, it appears to me that the captain or master is a person interposed between vendor and purchaser in such a way that the transitus is not at an end, and the goods will not be parted with, and the consignee will not receive them into his possession, until the voyage is terminated and the freight paid according to the arrangement in the charterparty." Here I come to the conclusion that the railway company, the lightermen, and the shipowners were all agents to receive the goods, not for the purpose of holding them for the purchaser or awaiting further orders, but of carrying them to Melbourne; and the transit was not terminated till their arrival at that place.

LOPES, L.J. I think the law applicable to this case may be shortly stated in the words used by Lord Ellenborough in *Dixon* v. *Baldwen*. (2) If the goods have so far reached the end of their journey, that they wait for new orders from the purchasers to put them again in motion, to communicate to them another substantive destination, and that without such orders they would remain stationary, the transitus is at an end. But where a place is fixed by the directions given by the buyer to the seller as the ultimate destination of the goods, and, a fortiori if there is an express stipulation as to their destination in the contract of sale, the transit is not at an end until the goods reach that place. Applying that rule to the present case, the only directions as to the destination of the goods were given by the vendees to the vendors by the letter of June 28; and the case seems to depend on the true construction of that letter. I can only read the terms of it as meaning that the goods were to be consigned to the shipowners to be forwarded to Melbourne. If that is so, it is obvious that no fresh orders were required from the purchasers as to the ultimate destination of the goods, and, until they reached Melbourne

(1) Law Rep. 4 Eq. 481, at p. 490. (2) 5 East, 175.

1888

BETHELL v. CLARK.

the transitus, and therefore the right to stop in transitu, would continue. I think that the decision given in the Court below was correct, and that the appeal should be dismissed.

Appeal dismissed.

Solicitor for trustee: *W. Beck.*

Solicitor for defendants: *C. A. Bannister.*

E. L.

[IN THE COURT OF APPEAL.]

March 22.

IN THE MATTER OF DUTY ON THE ESTATE OF THE INSTITUTION OF CIVIL ENGINEERS.

Revenue—Bodies corporate or unincorporate—Income or Profits of Property—Duty—Exemption—Appropriation for Promotion of Science—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-s.* 3.

By s. 11 of the Customs and Inland Revenue Act, 1885, a duty is imposed upon the annual value, income, or profits of property belonging to any body corporate or unincorporate, subject to an exemption in favour of property which, or the income or profits whereof, shall be legally appropriated and applied "for the promotion of education, literature, science, or the fine arts."

Held (by Lord Esher, M.R., and Fry, L.J., Lopes, L.J., dissenting, reversing the decision of the Queen's Bench Division), that the property of the Institution of Civil Engineers was entitled to the benefit of the exemption, as it was property which was appropriated and applied for the promotion of science.

APPEAL from a decision of the Queen's Bench Division, reported 19 Q. B. D. 610.

The proceedings originated by a writ of summons in the Queen's Bench Division commanding James Forrest, the secretary of the Institution of Civil Engineers, within fourteen days to pay to the Commissioners of Inland Revenue certain duties assessed by them upon the property of the institution in pursuance of the Customs and Inland Revenue Act, 1885; or within the same time to appear in the Queen's Bench Division and shew cause why default was made in paying the same duties. An appearance was duly entered to the writ.

The following material facts appeared from the affidavit made by the secretary, from the charter of the institution and the bye-laws and regulations made under it, and from the last report of

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

the council, dated May 25, 1886, all of which documents were made exhibits to the affidavit.

The Institution of Civil Engineers was incorporated by Royal Charter, dated June 3, 1828. The nature and objects of the institution, as defined in the charter, were: "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man, as the means of production and of traffic in states, both for external and internal trade, as applied to the construction of roads, bridges, aqueducts, canals, river navigation, and docks for internal intercourse and exchange, and in the construction of ports, harbours, moles, breakwaters, and lighthouses, and in the art of navigation by artificial power for the purposes of commerce, and in the construction and adaptation of machinery, and in the drainage of cities and towns."

In the last report of the council it is pointed out that, since the charter was drawn, the range of practice of the profession has become much enlarged, and after enumerating a great number of classes of works with which practitioners in the art may now have to do, the report proceeds: "This is a comprehensive, but by no means a complete catalogue, and if an estimate is attempted to be formed of the work done under it in the last century, and of the effect this work has had on the development of trade and commerce, on finance, and indeed on every possible aspect of human interest, it must be admitted that the profession of civil engineering has become a truly great power."

The whole property of the institution is and always has been exclusively devoted to the furtherance of these objects.

Section 2 of the by-laws now in force deals with the constitution of the institution, and provides that it shall consist of corporate members and associates, and honorary members, and that the institution may also have attached to it associates who are not entitled to the privileges of corporate membership, and students.

In order to qualify a candidate for election as a corporate member, he shall have been regularly educated as a civil engi-

neer according to the usual routine of pupilage, and shall have had subsequent employment for at least five years, and shall be actually engaged at the time of his application for election in responsible situations as resident engineer, or otherwise, in some of the branches defined by the charter as constituting the profession of a civil engineer, or he shall have practised on his own account in the profession of a civil engineer for at least five years, and shall have acquired a considerable degree of eminence in the same.

A candidate for election as an associate entitled to the privileges of corporate membership shall have been regularly educated as a civil engineer, and shall be actually engaged, at the time of his application for election, in the design or in the construction of such works as are comprised within the profession of a civil engineer as defined by the charter; or he shall satisfy the council that he has had a sufficient training, and that he has been engaged for at least five years, and that he is actually engaged at the time of his application for election, in the design or in the construction of such works as are comprised within the profession of a civil engineer as defined by the charter.

Candidates for election into the class of associates not entitled to the privilege of corporate membership shall be persons who are not civil engineers by profession, but whose pursuits constitute branches of engineering, or who by their connection with science, or the arts, or otherwise, are qualified to concur with civil engineers in the advancement of professional knowledge.

Honorary members shall be either distinguished individuals who from their position are enabled to render assistance in the prosecution of public works, or persons eminent for science and experience in pursuits connected with the profession of a civil engineer, but who are not engaged in the practice of that profession in the United Kingdom or its dependencies. Students shall be persons not under eighteen years of age who are, or have been, pupils of corporate members of the institution, and who have the object or intention of becoming engaged in the design or in the construction of such works as are comprised within the profession of a civil engineer as defined by the charter; and such persons may continue students until they

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

attain the age of twenty-six years, but not longer. Students may be admitted by the council on the recommendation of the corporate member under whom they are, or have been, pupils; they are to pay a yearly subscription, and when their first year's subscription has been paid, they may attend, but not vote at, ordinary meetings; they may compete for the premiums and prizes arising out of any funds devoted by the institution, or by any person or persons, for premiums or prizes for students; and the council may accord to them other privileges, subject to such terms, regulations, and restrictions as the council shall from time to time prescribe.

The property of the institution consists of certain premises, being No. 25, and part of No. 24, Great George Street, Westminster, which are partly freehold and partly leasehold, with the furniture, books, drawings, and appliances therein contained, and of certain investments in government, railway, and other securities, particulars of which are given in the report. That property is entirely the product, either of voluntary donations or bequests from members of the institution, or arises from the savings made by the institution out of the annual subscription of members, or from admission fees of members, or life compositions in lieu of annual subscriptions. In addition to such property, the institution has a considerable annual income derived from the annual subscriptions of corporate members, associates, and students; but no part of such income arises from the sale of publications to the public, nor from any charge for the use of the premises for any purpose whatever, although such use is readily accorded, in pursuance of powers contained in the by-laws, gratuitously to societies with cognate objects. As appears from reference to the report and the abstract of receipts and expenditure appended thereto, such property and income is partly held and applied by the institution upon specific trusts, and partly forms their general corporate property, and is applied by them for the general purposes of the society.

The manner in which the institution carries out the objects for which it was established is as follows: The premises, No. 25 and part of No. 24, Great George Street, are occupied by the institution. Besides the usual office accommodation, they contain a

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

reading-room and a large room for the purposes of meeting and discussion, and a library of upwards of 21,000 volumes of scientific and technical works, and a collection of drawings relating to matters of interest and instruction to civil engineers. During each yearly session of the institution, the council invite contributions from their members in the shape of papers or treatises upon engineering subjects, or any scientific matter which is capable of application for the purposes of civil engineering. A certain number of such papers selected by the council for merit and interest are read at the ordinary meetings of the institution, held for the purpose every Tuesday evening (with certain exceptions) during the session. Such reading is followed by a discussion, in which, in addition to the members of all classes, persons not members, but competent to advance the knowledge of the subject under consideration, are invited to take part, and the papers themselves, and the reports of the discussions upon them, along with other selected original papers, and abstracts of papers in foreign transactions and periodicals, are printed in the minutes of proceedings of the institution, which are circulated gratuitously amongst the corporate members, associates, and the students of the institution, and the cost of which forms by far the largest item in the general expenditure of the institution. The subjects of papers so read and discussed during the session of the institution ending in May, 1886, are set out in the report, and are there stated to represent "the varied character and the advanced position of the engineering of the present day." For some of the papers so contributed, which the council deem of special merit, prizes and premiums of various values are awarded, particulars of which appear in the report. These prizes and premiums are all provided out of special trust funds held by the institution for the purpose. Any surplus of such trust fund is invested by the institution so as to increase the ultimate value of the specific bequest or donation from which such surpluses respectively arise.

The library of the institution is open to all corporate members, associates, and students of the institution, and is much consulted by them. The students of the institution hold meetings for the reading of papers and discussion, which are confined to their own grade, but are presided over by a corporate member.

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

The premises occupied by the institution are occasionally lent gratuitously for the meetings of kindred societies, such as the Institution of Mechanical Engineers, the Society of Telegraph Engineers, &c. Among other bodies to whom such gratuitous use is allowed is "The Benevolent Fund of the Institution of Civil Engineers," the object of which is to afford assistance to necessitous members and associates of the institution, but its affairs are administered by a separate body, and it has a totally distinct organization.

The purposes and matters hereinbefore mentioned, as explained and amplified by the charter, by-laws, report and abstract of receipts and expenditure, together with the ordinary expenses of rent, maintenance, &c., of buildings, and the salaries of the secretary and other officials and servants of the institution, are the only purposes and matters whatever to which any part of the income of the property of the institution is applied. By s. 15 of the by-laws, "the property and effects of the institution of what kind soever are vested in the corporate members for the time being, for the use of the body politic and corporate solely, in furtherance of the public and scientific objects contemplated in the charter. Under no pretence whatever shall such property and effects, or the income or revenue of the institution, derived from voluntary contributions or otherwise howsoever, be applied in making any dividend, gift, division, or bonus, unto or between any of the corporate members, and the same is hereby expressly prohibited, in conformity with the fundamental law and invariable practice of the institution, as acted upon from its first establishment; and therefore no proposition in contravention thereof shall be entertained by the council, or by any meeting, whether general or special, of the corporate members of the institution."

The members of the institution have no exclusive right to practise the profession of a civil engineer, nor has the institution itself any power to prevent any person whatsoever from practising such profession, nor to impose any examinations, tests, or regulations whatever upon any person who desires to practise such profession, nor to exercise any control or discipline whatever over the members of the profession as such. It has only the

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

ordinary power of every association to expel from its body any person whom the members think unfit to remain within it; and even such expulsion would not prevent the expelled member from continuing the practice of a civil engineer if he thought fit.

The roll of the institution set out in the report shewed that in 1886 the aggregate number of honorary members, members, associate members, associates, and students, was 5100.

The Commissioners of Inland Revenue assessed the duty upon the property of the institution under s. 11 of the Customs and Inlands Revenue Act, 1885 (48 & 49 Vict. c. 51), which enacts: "Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted, that there shall be levied and paid to Her Majesty in respect of all rent and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the 5th day of April, 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of 5*l.* per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property. Subject to exemption from such duty in favour of property of the descriptions following (that is to say):—

"(3.) Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts:

"(6.) Property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding."

The Queen's Bench Division gave judgment for the Crown (1) The institution appealed.

(1) 19 Q. B. D. 610.

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

Feb. 23. Sir *H. Davey*, Q.C., and *Moulton*, Q.C., (*F. R. Y. Radcliffe*, with them) in support of the appeal.

Sir *E. Clarke*, S.G., (Sir *R. E. Webster*, A.G., and *A. V. Dicey*, with him) for the Crown.

Cur. adv. vult.

1888. March 22. LORD ESHER, M.R. In this case the question is whether the Institution of Civil Engineers is liable to a duty imposed by s. 11 of the Customs and Inland Revenue Act, 1885, upon the annual value, income, or profits of property belonging to them as a body corporate, or whether on the proper construction of the exception in that section the institution has an income which is legally appropriated and which is applied for the promotion of education, literature, science, or the fine arts. The interpretation of the statute is not really in dispute, and its meaning is well expressed in the judgment of the Lord President in *The Society of Writers to the Signet* v. *Commissioners of Inland Revenue* (1) that the meaning of the clause of exemption is that the property or income shall be, if not exclusively, yet certainly in the main, and as its chief object, devoted to the promotion of education, literature, science, or the fine arts. By that I understand that such an institution would not be less one for the promotion of science because there might be some subsidiary object, the question to be determined is what is the main object. The question therefore in the present case is not on the construction of the statute, but is whether, looking to what we are told of the society, we come to the conclusion that its object is the promotion of science and that that object is carried out.

The institution is incorporated, and in its charter its nature and objects are declared to be "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer." The object is not stated to be the promotion of the profession of a civil engineer but a species of knowledge "being the art of directing the great sources of power in nature for the use and convenience of man" in the manner then set out. I think a great deal depends on the way that has been carried out, and looking into the matter I do not think the institution

(1) 14 Rett. 34.

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

Lord Esher, M.R.

has been carried out as a mere school of engineers. On the contrary, it seems to me that the object is to spread general principles, and not to teach the individual to be a working civil engineer. I do not think it can be properly said that the object is to instruct persons to carry on the profession of a civil engineer. It is not necessary that a person who desires to practise in that profession should be a member of the institution, and in that this case differs from that of the writers to the signet. It is true no one can be a student of the institution unless he has an intention to become a civil engineer, but a man may be a civil engineer independently of the institution. That which this society does is something higher and larger than the mere education of students and others for the profession of civil engineer. To profit by the lectures and publications of the society a man would require large knowledge of his profession, without which he would not be capable of understanding the matters brought forward. The main object of the institution appears to me to be the promotion of the highest form of science, and I think therefore it comes within the exception and is not liable to the duty. I am of opinion that this appeal should be allowed.

FRY, L.J. The question in this case arises under s. 11, sub-s. 3, of the Customs and Inland Revenue Act, 1885, and is whether the property of the institution or the income from it is legally appropriated and applied for the promotion of science.

Before going further let me make one or two observations on the construction of the statute. It appears to me that in order that the exemption may apply it must be shewn in the first place that the property or income is legally appropriated for promoting science; furthermore, it must be shewn that it is applied, that is, that it is actually applied, to the promotion of science. The two questions, it is obvious, are distinct. In the next place I express my concurrence in the rule laid down by the Lord President in the Scottish case (wherever that rule can be found to be applicable), that the inquiry is not whether the property is exclusively, but whether in the main and as its chief object it is devoted to the promotion of science. One other observation upon the statute is this:—that there is no qualification of the word "science"—it

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

Fry, L.J.

is not required that it shall be science in all its branches; nor is it required that it should be science which produces no practical result—it is not necessarily useless science. The science described does not cease to be science because it may prove, in the language of a great master of science, to be "a rich storehouse for the relief of man's estate." And again there is nothing in the statute which indicates that the persons who promote the science must be of a general character, there is nothing to prevent the exception applying even where the class of persons who are advancing the science may be defined or limited in some particular manner.

Now let me take the first of the two questions which have to be answered in this case. Is the fund in question legally appropriated to the promotion of science as its main object? That question must be answered by a consideration of the charter of the institution. The preamble to that charter shews that a voluntary society then existed for the general advancement of mechanical science "and more particularly for promoting the acquisition of that species of knowledge that constitutes the profession of a civil engineer;" and then the Crown constitutes the Institution of Civil Engineers as a body corporate for the purposes aforesaid. It appears to me that the fair result of that charter is this, that the society was made a body corporate for the purpose of advancing mechanical science; but that that advancement was anticipated from the activity and the intelligence of a body of men who were indicated by the name of the association, and by the description of the science which was to be advanced, namely, that practised by civil engineers. The question which arises upon this charter may be stated in this way: Is the object of the charter the promotion of the interests of a body of men by their acquisition of science, or, on the other hand, is it the promotion of science by the activity of the men of a particular profession? In my view it is the promotion of mechanical science by the activity of the body of civil engineers. I think, therefore, that the main object to which the fund is appropriated is the promotion of science. Then arises the second question, which is this: Is the fund or its income actually applied for the promotion of science? In order to answer that question, we must consider in what mode this Institution of Civil Engineers acts.

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

FRY, L.J.

On the one side I find that all the corporate members are members of the profession; that all students who are admitted to the lectures of the institution must be the pupils of corporate members; and that there is no sale to the public of the transactions or proceedings of the society. Those three facts tend towards the view that the body is a professional one. But on the other hand it must be observed that membership of this institution is not essential to the exercise of the profession of a civil engineer; that the institution has claimed and exercised no jurisdiction whatever with regard to the professional remuneration or charges of engineers, with regard to the etiquette of the profession or the conduct of its members; and further, that it does not appear ever to have taken any steps to promote the interests of the profession as contrasted with the general interests of the public. Furthermore, their proceedings are of a highly scientific character, and though not sold to the public generally are distributed to a considerable extent to various libraries, and persons who are likely to be interested in them. Looking at all these facts, my conclusion is, that the institution has not departed from the purposes indicated by its charter, and that the money is in fact applied for the promotion of science through the activity of the members of the Institution of Civil Engineers. I think, therefore, that the money is actually applied for the promotion of science as well as legally dedicated to it. One other observation I will make, which is this. It has been pressed upon us that the membership in this society is of pecuniary value to engineers, and I have no doubt that that is the case: but the observation does not appear to me to go far. It is obvious that membership in many bodies formed for the cultivation of science is of pecuniary value to certain classes of persons. A fellowship in the Royal Society is undoubtedly of pecuniary value to medical men, to engineers, chemists, and others; nevertheless it is plain that the object of that society is the promotion of science.

In the result I agree with the Master of the Rolls, and I am unable to concur in the judgment of the Court below.

LOPES, L.J. I am unable to agree with the conclusion arrived at by the rest of the Court. I agree with the interpretation

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

Lopes, L.J.

placed upon the words of the exemption in question, but I am unable to concur with the application of that interpretation to the facts of this case.

The funds of the institution are clearly within s. 11 of the Customs and Inland Revenue Act, 1885, and would be subject to duty, unless the exemption in sub-s. 3 applies. The exemption is in favour of "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

The question which arises in this case is, whether the income or profits of this institution are legally appropriated and applied to science within the meaning of the exemption, i.e. legally appropriated by the charter, and in fact applied.

In the case of *Reg.* v. *Institution of Civil Engineers* (1) the question arose whether the same institution was exempted from payment of poor-rates under s. 1 of 6 & 7 Vict. c. 36 (which exempts from rateability societies instituted "exclusively" for the purposes of science, literature, and the fine arts), and it was held that the exemption did not apply, because the property of the institution was appropriated and applied, not for the promotion of general education or science, but for the promotion of a particular branch of knowledge in order to enable the members of the institution to practise with more success the profession of a civil engineer.

It is true the statute in that case contained the word "exclusively," which does not occur in s. 11 of the Act of 1885, but I do not think that makes any substantial distinction between the principle which applied there and the principle which ought to be applied here.

The Scotch case (2) decided in 1886 was a decision on the exemption now in question. The eminent judges who decided that case seem to have proceeded on the same principle as the learned judges proceeded in the case of *Reg.* v. *Institution of Civil Engineers* (1), just cited. The Lord President says: "I appre-

(1) 5 Q. B. D. 48.

(2) *Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 14 Rett. 34.

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

LOPES, L.J.

hend that the meaning of this clause of exemption is that the property or income shall be, if not exclusively, yet certainly in the main, and as its chief object, devoted to the promotion of education, literature, science, or the fine arts." Lord Shand says: "The object of this society is the maintenance of a permanent body of professional men, with recognized privileges, and the object which any one joining the society has in view is not education, or the promotion of education, literature, or science, but that he shall become a member of the society, in order to the practice of his profession as a writer to the signet." Recognising the distinction between that case and the present, viz., that it is essential that any one intending to become a writer to the signet should join the Society of Writers to the Signet, and that it is not essential or necessary that any one intending to be a civil engineer should join the Institution of Civil Engineers, I am still of opinion the principle of the Scotch case applies and governs the case now before the Court.

In my opinion the test of exemption or non-exemption may be thus stated: If the primary and direct object for which the institution exists is the promotion of science, it is within the exemption, and the fact that it indirectly and subordinately promotes the advancement of a particular class will not deprive it of the protection of the exemption. If on the other hand the primary and direct object of the institution is the advancement of its members in a particular profession so as to enable them with more success to practise their profession in a particular branch of science (such advancement of its members being the primary and direct, and the promotion of science the secondary and subordinate object), it is not within the exemption.

I have now to determine under which of these two descriptions the Institution of Civil Engineers should be classed. I think under the latter for reasons some of which I will state.

The institution in the charter and by-laws is called "The Institution of Civil Engineers," and the declared object of the society is "For the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer."

1888

IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS.

Lopes, L.J.

Under the head of "Constitution" the by-laws state that the Institution of Civil Engineers shall consist of three classes, members, associates and honorary members, with a class of students attached. Students are defined as persons not under eighteen years of age, who are or have been pupils of members or associates of the institution, and who have the object or intention of becoming civil engineers. It is of members or intending members of the profession of a civil engineer that the society is composed, the slight admixture of persons other than members of this profession fails to destroy the distinctive character of its constitution.

Everything in the by-laws, the regulations, and in the reports, and in the application of the funds of the society points in the same direction. The predominating idea is the education and advancement of civil engineering as a profession.

I am of opinion, therefore, that the primary and direct object of the institution is the advancement of its members in the profession of civil engineers, so as to enable them with more success to practise that profession, and not the promotion of science within the meaning of s. 11, sub-s. 3, of the Act.

In my opinion the decision of the Court below was right and should be affirmed.

Appeal allowed.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for the Institution of Civil Engineers: *Radcliffe, Cator & Martineau.*

A. M.

WENNHAK *v.* MORGAN AND WIFE. 1888

Libel—Publication—Husband and Wife—Communication of Libel by Husband to Wife—Defacement of Testimonial of Character—Damages. *Feb. 7.*

In an action for libel the fact that the defendant has disclosed the libel to his wife is not evidence of publication.

In an action for maliciously defacing the written character of a servant by writing upon it a disparaging statement, the plaintiff may recover substantial damages.

MOTION by the plaintiff for a new trial on the ground of misdirection.

The action was against the defendant and his wife for libel, and for malicious damage to a document.

At the trial before Mathew, J., and a jury, it appeared from the opening speech of the plaintiff's counsel that the plaintiff, a domestic servant, had been in the employment of a lady who had since gone abroad, and who gave him a good character in writing. The plaintiff afterwards entered the service of the defendant on the faith of the character, which he handed to the defendant. Finding that the place did not suit him the plaintiff gave notice to leave. After the notice had been given, the defendant one morning summarily dismissed the plaintiff, charging him with having been absent from the house during the night without leave. The plaintiff asked for his character, which was delivered to him by the defendant's wife, when it was found that the defamatory words complained of had been written upon it by the defendant.

The words were to the effect that the plaintiff had been dismissed for staying out all night without leave.

On the opening the learned judge held that there was no publication, and with respect to the claim for maliciously damaging the character, that it was the property of the plaintiff, but that he could not recover more damages than a shilling. The verdict was entered accordingly.

Bassett Hopkins, for the plaintiff. There was evidence of publication by the husband to the wife. The principle that husband and wife are one person in law is not applicable to the law of

1888

WENNHAK v. MORGAN.

libel. An action would lie for defaming a man to his wife, or a wife to her husband: *Wenman* v. *Ash* (1); in that case Maule, J., said: "In the eye of the law, no doubt, man and wife are for many purposes one: but that is a strong figurative expression and cannot be so dealt with as that all the consequences must follow which would result from its being literally true. For many purposes, they are essentially distinct and different persons,—and, amongst others, for the purpose of having the honour and feelings of the husband assailed and injured by acts done or communications made to the wife." At any rate the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12, has the effect of destroying the identity of husband and wife. Secondly, the testimonial was the property of the plaintiff, and he was entitled to more than nominal damages for the defacement of it. It is like the licence of a cabman, or the diploma of a doctor or teacher. If indorsed with disparaging remarks it becomes worthless. The testimonial given to the plaintiff was in general terms, addressed to no particular person. It was delivered to the servant for his use and benefit, and was merely deposited with the defendant to be returned, and without any intention of passing the property in it to him.

Roland V. Williams, for the defendant. First, there was no evidence of publication of the libel. No case can be found in which it has been held that an action will lie for a defamatory statement made by the defendant to his wife only. In *Wenman* v. *Ash* (2) the statement was not made by the defendant to his wife, but was made by the defendant to the wife of the plaintiff.

[He referred to *Toogood* v. *Spyring* (3); *Taylor* v. *Hawkins*. (4)]

Secondly, the learned judge assumed that the plaintiff had a right of property in the document, and directed a verdict for a shilling, probably on the ground that there had been a technical violation of the right, but no actual damage.

Bassett Hopkins, replied.

HUDDLESTON, B. Two questions arise in this case. First, whether there was a publication under the circumstances; and,

(1) 13 C. B. 836, at pp. 844–5.
(2) 13 C. B. 836.
(3) 1 Cr. M. & R. 181.
(4) 16 Q. B. 308.

secondly, whether the learned judge was right in taking upon himself the issue as to the amount of damages to which the plaintiff was entitled. With respect to the first of those points this is, as far as we know, the first time it has ever been alleged in cases of this kind that the handing over of a libel by the libeller to his wife is a publication. I think that the question can be decided on the common law principle that husband and wife are one. The uttering of a libel to the party libelled is clearly no publication for the purposes of a civil action. And if a libel is uttered on a privileged occasion to a husband when his wife is present, it has been held that her presence does not take away the privilege.

In Odgers on Libel and Slander, 2nd ed., p. 153, there is a reference to *Trumbull* v. *Gibbons* (1), an American case, of which there is a note in Townshend on Slander and Libel, as follows: "Gibbons wrote defamatory matter of Trumbull, and had fifty copies printed in pamphlet form in Massachusetts. Forty-five copies he retained and five copies he sent to his wife in New Jersey, indorsing four of them with the names of certain persons, acquaintances of the wife, but without any instructions to the wife as to how she should dispose of the copies so sent to her. The wife delivered two of the copies in New Jersey to the persons whose names were indorsed thereon, and the others she delivered in New Jersey to Trumbull, who exhibited them to various persons. On Trumbull suing Gibbons in New York for libel, it was contended for defendant (1) that there was no publication by defendant, (2) or no publication within the State. The second point was overruled, and as to the first it was held that the delivery of the manuscript to be printed was a publication, although a delivery to a wife in confidence would not be a publication, yet, in the case then before the Court, the wife acted as the agent of her husband, and her delivery of the pamphlets amounted to a publication by the defendant. (*Trumbull* v. *Gibbons*. (1))"

We think it our duty to hold that, according to a well recognised principle, husband and wife are in the same position, and therefore that the uttering of a libel by a husband to his wife is no publication, in cases apart from the Married Women's Property Act, and that on that ground the decision of the learned judge

(1) 3 City Hall Recorder, 97.

1888

WENNHAK v. MORGAN.

Huddleston, B.

was right. With respect to the other question it was a matter of much more difficulty, viz., how far the learned judge at the trial was justified in taking on himself the duties of a jury with respect to damages. For the defendant it is contended, first, that the document defaced was not the plaintiff's property, and, next, that the act done to it was not done maliciously or mischievously, but bonâ fide and without malice. The learned judge held that the testimonial so handed over by the plaintiff to the defendant was and remained the property of the plaintiff. I do not at present think that we are in a position to say that the learned judge was right or wrong on the point. There is much in the argument of the learned counsel that it would be a question for the jury, looking at all the circumstances, whether, when the plaintiff handed over the testimonial to the defendant he did so with the intention of passing the property in it. There is a material distinction between the letters ordinarily written in answer to an inquiry as to a servant's character—which would probably be the property of the master proposing to engage the servant—and a general testimonial of good character, which is, I should think, intended to be used as a voucher on future occasions. In this case the lady who gave the testimonial was abroad, and could not be applied to for a renewal of it. There might well have been a question for the jury whether, under the circumstances, the handing over of the testimonial was a deposit, or a parting with the property so as to vest it in the defendants. If the jury found that it was merely a deposit, the illustration given in argument of handing over a diploma on an application for a situation would apply. However, the learned judge decided that point in favour of the plaintiff. The next point is that the learned judge took upon himself to decide the amount of damages. We think that was a matter entirely for the jury. The learned judge seems to have thought that the only measure of damage was the expense of obtaining a renewal of the character. But it cannot be said that that expense would be no more than a shilling. There might be much expense in finding out where the lady was, and in communicating with her. Further, if the jury found that the indorsement was malicious they might have given large damages. Under these circumstances we think that on the

ground that there was no publication the verdict must be entered for the defendant on the claim for libel, and that the other issues must be sent down to be retried by a jury.

MANISTY, J. I come to the same conclusion. The case, although in one view a comparatively small one, involves a very important principle. On the first point the maxim and principle acted on for centuries is still in existence, viz., that as regards this case, husband and wife are in point of law one person. The earlier authorities on this point are collected in Montague Lush on Husband and Wife, at p. 3.

It would be enough to say that that is the law and the ground of the law. But what is the real foundation of it? It is, after all, a question of public policy, or, as it has been well called, social policy. No doubt that principle has been interfered with by judge-made law. Public opinion has altered in some circumstances, and no better illustration of that can be given than the change of view as to deeds of separation between husband and wife. But, if public policy is considered, what is there to shew any change in judicial opinion or public policy with respect to communications between husband and wife hitherto held sacred? It has been argued that in some cases it might be well that publication of slander by a man to his wife should be actionable. But look at the other side, would it be well for us to lay down now that any defamation communicated by a husband to a wife was actionable? To do so might lead to results disastrous to social life, and I for one would be no party to making new law to support such actions. I may say incidentally that there is no pretence for arguing that this action could be maintained against the female defendant, for all that she did was to hand the alleged libel to the plaintiff himself, so judgment should have been entered for her. Then as to the other question. The learned judge proceeded on the ground that there was no evidence of damage. If that was so, what becomes of the cause of action? The allegation is that the defendant maliciously—for mischievously may be put out of consideration—defaced the testimonial. That involves two questions: first, whether the indorsement was written maliciously or bonâ fide on a document not the property of the plaintiff. The

1888

WENNHAK v. MORGAN.

Manisty, J.

learned judge held that the document was the property of the plaintiff, and must also have held that the indorsement was maliciously written, but he thought that the damages were only a shilling. I think the question of property was for the jury. Under certain circumstances the testimonial might be the property of the defendant. It might be that the testimonial was only deposited with the defendant and was the property of the servant. But that is a question of fact and not of law. The next point is more serious; the learned judge held that there was no evidence of damage, but to sustain the verdict on this part of the claim the act of indorsing must have been done maliciously. The damage was a question for the jury. So I think that in coming to the conclusion that there was no evidence of damage, and therefore taking on himself to give a verdict for a shilling, the learned judge was wrong, and therefore that the issues on the second part of the statement of claim must go down to a new trial, and the verdict and judgment for the defendant on the first part of the claim will stand.

Judgment accordingly.

Solicitor for plaintiff: *C. A. Swaine.*

Solicitor for defendant: *Fred. Romer.*

J. R.

March 22.

COWAN *v.* O'CONNOR.

Mayor's Court—Jurisdiction—Contract by Telegraph—Order from without the City accepted within it.

An order to make certain bets having been transmitted by postal telegraph from the plaintiff without the city of London to the defendant within it, he telegraphed from the City that the order had been obeyed:—

Held, that the contract of agency was made in the City, and that an action for the breach of such contract was within the jurisdiction of the Lord Mayor's Court.

APPLICATION referred from chambers for a writ of prohibition to the corporation of London and to the plaintiff in an action in the Mayor's Court.

The declaration in the action alleged that the defendant, acting for and on behalf of the plaintiff and as his agent in wagering on certain horse races, received to the use of the

plaintiff 356*l.*, and the plaintiff claimed the said sum on an account stated.

It appeared from affidavits that the plaintiff telegraphed from a post-office in Regent Street, outside the City, to the defendant at Ludgate Circus, within the City, directions to put certain sums of money as bets on certain racehorses, and gave an address at the Pall Mall Club, without the City. The defendant replied by telegram from Ludgate Circus to the plaintiff at the club, "You are on." The defendant alleged in his affidavit that he did not make any bet with any other person in consequence of the telegrams on behalf of the plaintiff, and that he had not received any money in respect of any bets made on behalf of the plaintiff or in consequence of the telegrams.

Danckwerts, for the defendant. Either the bets were made between the plaintiff and defendant directly, and therefore the sums claimed cannot be recovered, and there is no cause of action, or, if the contract was one of agency only, the whole cause of action did not arise within the City, and therefore the Mayor's Court had no jurisdiction.

First. The affidavits state that the defendant did not make the bets for the plaintiff, and that no moneys were received.

Secondly. The whole cause of action must arise in the City: *Cooke* v. *Gill*. (1) In the present case the post-office was the agent of the parties, on the principle explained in *Byrne* v. *Van Tienhoven*. (2) The authority to the agent was given, if at all, by the plaintiff at the post-office outside the City. That authority must be proved. It is a fact material to the cause of action. There is no evidence that any money was received by the defendant in the City.

Francis Watt, for the plaintiff. The whole transaction between the parties was in the City. The telegraph was merely a medium of communication, just as a speaking trumpet or tube would be.

[He was stopped.]

MANISTY, J. This is an application for a prohibition to the Lord Mayor's Court in a cause where the amount sued for exceeds

(1) Law Rep. 8 C. P. 107. (2) 5 C. P. D. 344.

1888

COWAN v. O'CONNOR.

Manisty, J

50*l.*, and therefore the whole cause of action must arise within the jurisdiction of the City. The order by the plaintiff to the defendant was sent by telegram, and to my mind that is exactly the same as if it was a letter sent through the post-office, and until that reached the defendant he had no authority. He received this telegraphic communication in the City, and answered it in the City. It is said that there is a fact outside the City to be proved, viz. the authority of the telegraph office to send this telegram. This is not the case. All that need be done is to prove the receipt by the defendant of the order from the plaintiff directly, and the answer directly. I am clearly of opinion that in the present case there is no necessity to prove that the post-office had authority to send the telegram; it was merely a medium of communication between the parties, who are in the same position as if they met together and made a contract. There is nothing to justify us in granting a prohibition.

HAWKINS, J. I am of the same opinion. It is said that the Lord Mayor's Court has no jurisdiction because the telegram by which the directions to the defendant were given was despatched from Regent Street, although delivered in the City, and therefore that part of the cause of action arose out of the City. I am not of that opinion. I think that where, as here, a person opens a correspondence and initiates a transaction by telegram he must be treated as though he were, through it, speaking to the person to whom such telegram is directed, at the place to which he directs it to be sent, and where he intends it to be delivered; and if he desires a reply by telegram, such reply must be considered as given to him at the telegraph office from whence such reply is despatched. A contract was created by two telegrams in the present case, and I am clearly of opinion that it was a contract in the City. But it is said that the authority to the telegraph clerk to communicate the telegram was an authority given in Regent Street. That may be. But it is perfectly certain that the authority given in Regent Street was an authority to do something, namely, deliver the message, in the City, and nowhere else. The authority to transmit the message, when established, is merely evidence which goes to fix the

1888

COWAN v. O'CONNOR.

Hawkins, J.

sender with the responsibility of sending it; but it is no part of the cause of action. If this objection were to prevail, no manufacturer in the country who sends his traveller to receive orders in the City to supply goods could sue in the Mayor's Court for the price, although the contract was made by the traveller and the goods delivered in the City. We have nothing to do with the question whether the contract was that alleged, which, when the case goes to trial it will be for the tribunal before which it is to be tried to decide. Then it is said there is another element of consideration, viz., the receipt of the money. Of course, the the plaintiff will have to prove that it was received, or he will fail on the merits.

Application refused.

Solicitor for plaintiff: *G. C. Scoles.*
Solicitor for defendant: *C. Butcher.*

J. R.

[IN THE COURT OF APPEAL.]

March 27.

PRIM *v.* SMITH.

Mayor's Court of London—Practice—Certiorari—Time for lodging Writ—The Mayor's Court of London Procedure Act, 1857 (20 & 21 *Vict. c. clvii.*), ss. 16, 17, 19—*Borough and Local Courts of Record Act*, 1872 (35 & 36 *Vict. c.* 86), *Schedule, r.* 12.

By the Mayor's Court of London Procedure Act, 1857, s. 17, "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior Court, unless the writ removing such cause shall have been lodged with the proper officer of the Court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court:"—

Held (affirming the judgment of the Queen's Bench Division), that the section gave alternative periods for lodging the writ, and that the defendant could avail himself of whichever was the longer period.

APPEAL from an order of the Queen's Bench Division (reported ante, p. 554) directing a writ of certiorari to issue for the removal of the action into the High Court of Justice.

The action was commenced in the Mayor's Court of London, and a summons was issued for a certiorari on behalf of the defend-

1888

PRIM v. SMITH.

ant to remove the action into the High Court, and a master made an order accordingly.

On appeal Field, J., referred the matter to the Court, and the application was heard by Mathew and A. L. Smith, JJ., who differed in opinion. The order of the master was therefore affirmed, and leave to appeal given. (1)

The question arose under the Mayor's Court of London Act (20 & 21 Vict. c. clvii), s. 17, which enacts "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior Court, unless the writ removing such cause shall have been lodged with the proper officer of the Court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court." The action was commenced and the plaint served on November 26, 1887, and on January 17, 1888, more than a month after service of the plaint, but before the action had been entered for trial, the summons for a certiorari was applied for.

Horne Payne, Q.C., and *Colam*, for the plaintiff. The final limit of time within which an action can be removed from the Mayor's Court is one month, and that is liable to be cut down if the cause is entered for trial within the month. The application was made too late, and ought not to have been granted. [They cited *Metropolitan Board of Works* v. *Steed.* (2)]

R. M. Bray, for the defendant, was not called on.

FRY, L.J. The question we have to determine arises on s. 17 of the Mayor's Court Act, 1857. The section may be simplified, because both periods mentioned in it are limited by reference to the lodging the writ of certiorari with the proper officer of the Court. The section would then read that no cause shall be removed unless the writ of certiorari is lodged with the proper officer within one month after service of the plaint, or before entry of the action for trial. I cannot doubt that the proper use of the word "or" is to express an alternative, and when alternative periods are limited within which a thing is to be done, the effect is to give the longer of the periods as the time in which

(1) *Ante*, p. 554. (2) 8 Q. B. D. 445.

1888

PRIM v. SMITH.

it may be done. In the present case is there anything insensible in giving that effect to the word? I think not. There does not seem to me to be anything unreasonable in the provision that the defendant is to have a month, or the time up to the entry of the action for trial, whichever be the longer. I think, therefore, the objection to the order fails, and that the decision of the Queen's Bench Division and the master must be affirmed.

LOPES, L.J. I entirely agree. The section bears to my mind this construction, that there are two periods in which the defendant may lodge the writ to remove the action, one period a month certain after service of the plaint, the other any time before entry of the action for trial. We are asked to read "or" as if it were "and." No doubt there are cases where this should be done, but they are cases where the natural meaning would give rise to an interpretation unreasonable, inconsistent, or unjust. No such effect arises in this case from reading the word "or" in its natural sense, and I think, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Ranger & Burton.*

Solicitor for defendant: *W. F. Tarn.*

A. M.

1887

Dec. 14, 15.

MORTGAGE INSURANCE CORPORATION, LIMITED, APPELLANTS; COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp Duty—Promissory Note—Agreement—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 49.

By an instrument headed "Policy of Insurance," after reciting that E. was desirous of being insured with the appellant corporation, and that there had been paid to the corporation 9*l.* 17*s.* 4*d.*, being the agreed premium for such assurance, it was witnessed that the corporation did thereby guarantee to the assured payment of the sum of 100*l.* on May 18, 1976; provided that if the assured should be desirous at any time of surrendering the policy, the corporation would allow to him the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders:—

Held, that, for the purposes of the Stamp Act, 1870, this instrument required to be stamped as an agreement, and not as a promissory note.

CASE stated by the Commissioners of Inland Revenue under the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 19.

1887

MORTGAGE INSURANCE CORPORATION v. COMMISSIONERS OF INLAND REVENUE.

On June 7, 1887, the appellants' solicitors presented, under the provisions of s. 18 of the Stamp Act, 1870, an unstamped instrument to the commissioners for their opinion as to the liability thereof to stamp duty. The instrument (omitting immaterial parts) was as follows:—

"Amount insured 100*l.*

"This policy of insurance witnesseth that whereas W. Elkin, Esq. (who with his executors, administrators, and assigns are hereinafter called the assured), is desirous of being insured by the corporation as hereinafter appearing, and there has been paid to the corporation the sum of 9*l.* 17*s.* 4*d.*, being the agreed premium for such assurance, now these presents witness that the corporation do hereby guarantee to the assured payment of the sum of 100*l.* on the 18th day of May, 1976, Provided that if the assured shall be desirous at any time of surrendering this policy the corporation will allow to the assured the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders.

"In witness, &c."

The commissioners, being of opinion that the instrument was chargeable with stamp duty as a promissory note for 100*l.*, assessed the duty thereon at one shilling, and the instrument was stamped in conformity with that assessment.

The appellants, being dissatisfied with such assessment, required the commissioners to state and sign this case.

Sir H. James, Q.C. (*Moulton, Q.C.*, and *Reginald Brown*, with him), for the appellants. The question is whether this document should be treated as a promissory note or an agreement, for the purposes of the stamp duties. It is something more than a mere promissory note, which is required to be stamped with a one shilling stamp: It is an agreement, only requiring a sixpenny stamp. The definition of a promissory note in s. 49 of the Stamp Act, 1870 (1), cannot be construed literally. It is not true to say

(1) 33 & 34 Vict. c. 97, s. 49 (1): "The term 'promissory note' means and includes any document or writing (except a bank note) con-

that every instrument which contains a promise to pay money is a promissory note for the purposes of the Act. Where the instrument contains obligations to be performed by both parties and a promise to pay a sum of money by one of them, it is an agreement and not a promissory note. No business man would call this instrument a promissory note in the common acceptation of the term. No doubt it contains an agreement to pay, upon receipt of a certain sum, 100*l.*, at a fixed date, but the appellants further undertake not merely to pay 100*l.* in 1976, but to allow the promisee to call upon them to pay the surrender value at any period. That surrender value is to be paid according to the tables of the company for the time being in force. It is a shifting sum, not ascertained even on an actuarial estimate. It may vary from time to time with alterations made by the company in their tables. The company undertake to keep those tables in order that the assured may at any time calculate the surrender value, but supposing that for any reason they ceased to keep the proper tables, the assured could sue them, not merely on their promise to pay, but on their agreement, in order to make them keep and produce tables so that he might ascertain the surrender value; and in that case the document would be put in as an agreement.

In the *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1), the question was whether the instrument before the Court ought to be stamped, under the Act of 1870, as a promissory note, or as a debenture. The tests applied by the Court in deciding that it should be stamped as a debenture were, whether, though in one sense a promissory note, it contained matters other than those usually contained in promissory notes; and whether it would strike any commercial man as something very different from a promissory note. In *Yeo* v. *Dawe* (2), the question was whether the instrument ought to be stamped as a

taining a promise to pay any sum of money."

(2.) "A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this Act a promissory note for the said sum of money."

(1) 7 Q. B. D. 165.

(2) 53 L. T. Rep. (N.S.) 125.

1887

MORTGAGE INSURANCE CORPORATION v. COMMISSIONERS OF INLAND REVENUE.

promissory note or as an agreement, and the Court of Appeal held that it should be stamped as an agreement. The judgments of Brett, M.R., and Baggallay, L.J., proceeded on the ground that the instrument was not given or taken by the parties as a promissory note, and was not in fact a promissory note in the business sense of that term. In each of those cases the instrument came within the words of s. 49 construed literally. Applying the same tests here, the document must be read as a whole; the part containing the promise to pay is controlled by the provisions which follow; it clearly was not intended by the parties to be a promissory note; nor is it a promissory note in the common acceptation of the term among business men; it is a promissory note and something more. The question being, therefore, not merely whether the document required a stamp at all, but whether it should be stamped as an agreement or a promissory note, the commissioners ought to have allowed it to be stamped as an agreement.

Sir E. Clarke, S.G. (*Sir R. E. Webster, A.G.*, and *A. V. Dicey*, with him), for the respondents. The decision of the commissioners was right. Comparing s. 49 of the Stamp Act, 1870, with the provisions of the prior Stamp Acts, it is obvious that the legislature intended, by the later Act, to include in the term "promissory note" such a document as the one in question here. By 55 Geo. 3, c. 184, Sched., Part I., a promissory note which requires to be stamped as such is described as, "promissory note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times so that the whole of the money to be paid shall be definite and certain; and the following instruments shall be deemed and taken to be promissory notes within the intent and meaning of the schedule, namely, all notes for the payment of any sum or sums of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to 20*l.*" Then follow exemptions from duty in respect of "all notes promising the payment of any sum or sums of money out of any particular fund which may or may not be available, or upon any condition or

contingency which may or may not be performed or happen, where the same shall not be payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to 20*l.*, or be indefinite." There was also an exemption in respect of "all other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes." Those exemptions are not re-enacted in the Act of 1870, and the definition of "promissory note" is substantially enlarged by s. 49. It is not necessary to contend that all agreements containing a promise by one of the parties to pay money must of necessity be promissory notes within the meaning of that section: it is enough to say that the instrument in question does constitute such a promissory note. The words of sub-s. 2 are ample to cover it. The document contains three parts. The first part is mere recital: the second, which is the operative part, is a definite promise by the company to pay 100*l.* at a specified date; and the last part is simply an arrangement for discounting the value of the promissory note at the option of the promisee. The last part, in effect, merely super-adds a promise by the company, which, it is submitted, does not interfere with the character of the document as a promissory note. The dominant effect of this instrument is a promissory note, not an agreement, because the promisee does not bind himself to do anything further after he has paid the sum in consideration of which the company's promise to pay 100*l.* is given. In *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1) the question was whether the instrument should be stamped with a one shilling stamp as a promissory note, or with a half-crown stamp as a "debenture." The Court held that it ought to be stamped as a debenture, but both Grove, J., and Lindley, J., said that, if the question had been whether it should be stamped as a promissory note or not stamped at all, it would clearly be a promissory note within the words of s. 49. The grounds of the decision were that, the Act having in terms dealt with "debentures," the instrument in question was called a "debenture" by the parties to it; and

(1) 7 Q. B. D. 165.

1887

MORTGAGE INSURANCE CORPORATION v. COMMISSIONERS OF INLAND REVENUE.

that it would not be termed a promissory note by commercial men. That case is therefore in favour of the contention for the respondents. *Yeo* v. *Dawe* (1) differs from the present case because there was a condition to be performed by the plaintiff; the defendant's promise to pay was conditional upon the plaintiff executing the lease. The judgments of the Court of Appeal concede that the terms of s. 49 were large enough to include the document, but the majority of the Court held that it was a promissory note and something more, namely, an agreement, because a condition remained to be performed by the promisee before the promisor could be called upon to pay. They therefore held that the document could be put in evidence stamped as an agreement. It is submitted that upon principle and authority and upon the express words of the statute the instrument in the present case ought to be stamped as a promissory note and not as an agreement.

Sir H. James, Q.C., replied.

Cur. adv. vult.

Dec. 15. POLLOCK, B. This case was argued before us yesterday, and though the question is no doubt one of some importance, we have arrived at a conclusion upon it, and do not think any further consideration is necessary.

The question is whether a particular instrument—which is called a policy of insurance, though the name is not material—should be stamped with the one shilling stamp required for a promissory note, or with the ordinary sixpenny stamp required for an agreement. That depends upon the true construction of the Stamp Act, 1870. [The learned judge read s. 49, sub-ss. 1 and 2.] Now, I would first observe that we have not here to consider whether any duty is payable at all—whether this is a promissory note or nothing—but we have to consider an alternative proposition, whether it is a promissory note or an agreement. The distinction, as was pointed out in the two cases which have been cited, becomes important in considering together the provisions of the Act with respect to agreements and promissory notes, and the known usage with reference to those instruments.

(1) 53 L. T. Rep. (N.S.) 125.

1887

MORTGAGE INSURANCE CORPORATION v. COMMISSIONERS OF INLAND REVENUE.

Pollock, B.

We have, then, to construe s. 49 of the Act of 1870. I do not think that the argument founded upon the earlier Act, pari materiâ, namely, 55 Geo. 3, c. 184, helps us much. The later Act undoubtedly does enlarge the scope of the earlier, and intends to bring within its own provisions an instrument that would not come within the provisions of the earlier Act, but the question still remains whether the particular instrument comes within s. 49 of the later Act. The next question is, can we say that this instrument is necessarily included in the terms of the section? It would be easy to say that every instrument was necessarily included which provides simply and purely for the payment of money, whether it be one single payment, or distributed over a period, or to be paid out of a particular fund, or upon any condition or contingency. But can that construction be applied where, though all the terms of the section are satisfied with respect to the payment of money, the document is not a document which in ordinary parlance is called a promissory note, but contains terms beyond a stipulation for a mere money payment? In that state of things ought it to be treated as one instrument or as two separate instruments? I think it is clear that for the purposes of the Stamp Acts it cannot have been intended that a document should be treated as in part a promissory note and in part an agreement. It must be either one or the other. The question is, what is the dominant, the substantial effect of the instrument? In this respect the prior decisions assist me in forming a conclusion. The Courts have said that in order to determine the question two things must be inquired into—what is the intention of the parties, and what is the instrument in the common acceptation of men of business, or persons among whom it is commonly used. The two cases referred to in argument give authority for applying those tests. It is unfortunate, I think, that in a statute dealing with revenue matters natural terms have been enlarged so as to create a sort of legislative document other and different to the document which is commonly known by the term used. In the section we have to construe here the legislature have taken a term of well-known meaning, and have then said it is to mean something else. I agree that in considering whether this document is a promissory note we may discard the fact that it is

1887

MORTGAGE INSURANCE CORPORATION v. COMMISSIONERS OF INLAND REVENUE.

Pollock, B.

called a policy of insurance; we must look at the substantial effect of it. It recites that a certain person "who is desirous of being insured," has paid to the corporation a sum of 9*l.* 17*s.* 4*d.*, "being the agreed premium for such insurance." That part may, I think, be treated as mere recital and cannot be said to have any governing effect. Then the instrument goes on to witness that the corporation guarantee to the assured payment of the sum of 100*l.* on May 18, 1976. So far, no doubt, there is a promise to pay a fixed sum at a fixed date. Then there is a proviso "that if the assured shall be desirous at any time of surrendering this policy, the corporation will allow to the assured the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender—such value to be paid according to the tables of the corporation for the time being in force with reference to surrenders." By that proviso a duty is cast upon the corporation, upon the assured giving notice of surrender, to fix the surrender value, and to fix it according to their tables for the time being in force. What the surrender value will be cannot now be predicated, because, as is well known, insurance offices vary their rates of surrender according to whether or not they have been fortunate with respect to lives insured. If they have had good fortune for several years, and persons insured with them have lived to great ages, so that the coffers of the company are full, they can afford to surrender at a better value than they could if they had experienced bad times and their coffers had been diminished. The duty to fix the surrender value involves that the company shall keep tables, and proper tables; that they shall be ready honestly and bonâ fide to go into the matter, and to fix the surrender value. I do not think that a document involving such duties and contingencies as those was meant to come within the words of s. 49, that "a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen shall be deemed for the purposes of this Act a promissory note for the said sum of money." There is something more than the mere performance of a condition; there is an accounting by the company, and something to be done by them. As was pointed out

in argument, it might be that for some reason the company omitted to keep tables, and in that case, if notice was given by a person insured, and the company said, "We are willing to pay you, but we do not know how much we have to pay as the surrender value of your policy," the claim against them would not be in respect of a simple demand for money, but a claim in respect of their breach of contract to keep proper tables, and in order to enforce that obligation against them.

It must be admitted, I think, that the words of s. 49 are not satisfied by merely shewing that the document in question contained a promise to pay any sum of money. If that were the right view of the construction the section would include cases in which a man said, "I will pay to you 5*l.* at Christmas if you will deliver to me a ton of hay before Christmas," or, "I will pay you 100*l.* at the end of ten months if you deliver to me two tons of hay at the end of each month;" or, where there was an agreement whereby a tenancy was created for a specified period with a power for the tenant to enlarge that period upon payment of a sum by way of premium or increased rent. All those cases would satisfy the words "containing a promise to pay any sum of money." Applying the tests I have mentioned, I am of opinion that the document in question is not a promissory note in the sense that the parties intended to treat it as a document merely providing for the payment of money; nor is it a promissory note in the common acceptation of that term among business men and others accustomed to deal with promissory notes. If it be said that this construction does not give effect to the words of the Act, the answer is, I think, that we are not called upon to say whether any duty is payable at all, but to say whether the document more properly comes within s. 49 relating to promissory notes, or within that part of the schedule which relates to agreements.

The description in the schedule of agreements which are to be stamped with a sixpenny stamp is clearly sufficient to include this instrument, and I am of opinion that it should be stamped as an agreement, and not as a promissory note.

HAWKINS, J. I am also of opinion that the instrument before us, which is called by the parties to it a policy of insurance, is not

1887

MORTGAGE INSURANCE CORPORATION v. COMMISSIONERS OF INLAND REVENUE.

Hawkins, J.

chargeable with the stamp duty as a promissory note, but is chargeable with duty as an agreement. The important words are these: "Now these present witness that the corporation do hereby guarantee to the assured payment of the sum of 100*l.* on the 18th day of May, 1976: Provided that if the assured shall be desirous at any time of surrendering this policy the corporation will allow to the assured the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders." Now had the instrument concluded with the date of May 18, 1967, omitting altogether the proviso, I should have thought that it was clearly a promissory note notwithstanding that it is designated a policy of assurance by the parties; for, although somewhat informal in its language, it would have contained all the requirements of a promissory note, namely, a promise to pay a definite sum to a payee unconditionally on an appointed day. From the proviso, however, it is evident that the words preceding the proviso do not express the whole agreement and intention of the parties, which was to make the payment of the full sum of 100*l.* conditional upon the non-election of the payee to surrender the so-called policy before the day specified for payment, and to impose upon the corporation the obligation to pay to the payee a commuted sum representing the present value of 100*l.* calculated according to the then tables of the corporation upon notice of his desire so to surrender; thus giving to the payee the right at any time thereafter, early or late, to require, and imposing upon the corporation the obligation to make, payment of the commuted sum in lieu of the stipulated, but deferred, sum of 100*l.*, and depriving the corporation of the right, which it would have had but for the proviso, to postpone the payment of any portion of the 100*l.* until May 18, in the year 1976. The proviso coupled with the promissory words of the instrument constitute the bargain made by the parties. The words relied upon as constituting the promissory note cannot be read apart from the rest of the document. This agreement clearly to my mind requires an agreement stamp. Supposing the payee to be desirous of claiming early payment of the commuted sum,

his claim would be based not on the words of the alleged promissory note, but on the words of the subsequent proviso; and this is a cogent proof that the whole document must be read, and so read it amounts to something more than a mere promissory note. By stamping it as a promissory note it would be inoperative as an agreement; but by treating it as an agreement effect would be given to the instrument as a whole. I do not forget sub-s. 2 of s. 49, which provides that a note promising payment of a sum of money "upon a condition or contingency which may or may not be performed or happen is to be deemed for the purposes of this Act a promissory note for the said sum of money." But this is not the case of a mere promissory note payable on a contingency; it is something more. It is a promise to pay the substituted sum; and in order to determine what stamp it should bear we ought not to forget that no action could or would be brought for the full sum of 100*l.* until May 18, 1967, but we ought to look at every contingency upon which the instrument might be sued upon.

For the reasons I have given, I think the document ought to be stamped as an agreement, and that the decision of the commissioners ought to be reversed.

Judgment for the appellants.

Solicitors for appellants: *Linklater & Co.*

Solicitor for respondents: *The Solicitor of Inland Revenue.*

W. A.

1888
Feb. 22, 28;
March 22.

[IN THE COURT OF APPEAL.]

IN RE POLLARD.

Solicitor—Bill of Costs—Order for Delivery—Business not transacted in Court—Jurisdiction—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 16.

The jurisdiction given by s. 37 of the Solicitors Act, 1843, to order delivery of a solicitor's bill of costs where no part of the business charged for has been transacted in any court of law or equity, was given to the Lord Chancellor and Master of the Rolls as judges of the Court of Chancery, and was transferred to the High Court of Justice by s. 16 of the Judicature Act, 1873. The judges of the Queen's Bench Division, therefore, have jurisdiction to order delivery of a bill of costs in such a case; though the application for delivery ought to be made in the Chancery Division.

So *held* by Fry and Lopes, L.JJ., Lord Esher, M.R., dissenting.

Decision of the Queen's Bench Division reversed.

By Lord Esher, M.R.:—Sect. 37 of the Solicitors Act, 1843, gave the jurisdiction to the Lord Chancellor and the Master of the Rolls, not as judges of the Court of Chancery, but in respect of their independent offices as Lord Chancellor and Master of the Rolls, and that jurisdiction has not been transferred by any subsequent legislation.

APPEAL from a decision of the Queen's Bench Division (1) dismissing an appeal from Field, J., who refused, at chambers, on the application of the appellants—Messrs. Stevens, Bawtree, & Stevens, solicitors—to order delivery of a bill of costs from Mr. R. S. Pollard, a solicitor.

The bill of costs in question was in respect of business no part of which had been transacted in any court of law or equity.

The learned judge, at chambers, and the Divisional Court, without considering the question on the merits, held that a judge of the Queen's Bench Division had no jurisdiction to order delivery of a bill of costs in such a case, because by s. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37, the jurisdiction was given to the Lord Chancellor and the Master of the Rolls.

Feb. 22. *Crump, Q.C.*, and *J. E. Bankes*, for the appellants. The jurisdiction given by the Solicitors Act, 1843, s. 37, to refer attorneys and solicitors' bills for taxation where no part of the business has been transacted in any court of law or equity, was

(1) Reported, ante, p. 160.

given to the Lord Chancellor and the Master of the Rolls as judges of the Court of Chancery: and that is shewn by the proviso which enables "the said respective Courts and judges" to order delivery of the bill of costs. It is conceded that before the Judicature Acts this jurisdiction could only be exercised by the Lord Chancellor, or by the Vice-Chancellors appointed to assist him in the judicial functions of his office under the statutes, 53 Geo. 3, c. 24; 5 Vict. c. 5; 14 & 15 Vict. c. 4; 15 & 16 Vict. c. 80; or by the Master of the Rolls. The office of the Master of the Rolls was formerly that of a master in Chancery: 3 Blackst. Com. 443; though he came to exercise jurisdiction of judging causes on the extraordinary side of the Court of Chancery. This power being much objected to, the legislature by 3 Geo. 2, c. 30, enacted that all orders and decrees made by the then Master of the Rolls, or any of his predecessors, or thereafter to be made by the Master of the Rolls or any of his successors, should be deemed and taken to be valid orders and decrees of the Court of Chancery; and by 3 & 4 Will. 4, c. 94, s. 24, the Master of the Rolls was empowered and required to hear and determine motions arising in the High Court of Chancery. Sect. 37 of the Solicitors Act, 1843, intended to give jurisdiction to the Master of the Rolls, having regard to his existing statutory jurisdiction as judge and master in Chancery. There is nothing to indicate that a personal jurisdiction was intended. By s. 16 of the Judicature Act, 1873, "there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, . . . the High Court of Chancery as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery;" and by s. 39 any judge of the High Court may, subject to any rules of court, exercise all or any part of the jurisdiction vested in the High Court by the Act. The jurisdiction of the Master of the Rolls in respect of the taxation or delivery of a solicitor's bill was therefore transferred to the High Court of Justice. That jurisdiction has in fact been exercised by the judges of the Chancery Division since the Judicature Acts without dispute; and Order LV., r. 2 (15), specifies "all applications under 6 & 7 Vict. c. 73, for the taxation and

1888

IN RE POLLARD.

delivery of bills of costs," as being matters which are to be disposed of in chambers by the judges of the Chancery Division. If the jurisdiction given by the Solicitors Act, 1843, to the Master of the Rolls has not been transferred to the High Court, it would follow that the judges of the Chancery Division have acted without jurisdiction in making orders under s. 37. It is submitted, therefore, that the Queen's Bench Division had jurisdiction to entertain the summons in the present case.

Murphy, Q.C., and *S. Woolf*, for the respondent. Sect. 37 of the Solicitors Act, 1843, gives the jurisdiction in question to the Master of the Rolls in respect of his office as Master of the Rolls, and not in respect of his being a judge or master in Chancery.

That jurisdiction was not transferred to the High Court by s. 16 of the Judicature Act, 1873. If it was so transferred, then by ss. 33 and 34 of that Act, and Order LV., r. 2 (15), it is a matter assigned to the Chancery Division to be dealt with in chambers, and the Master on that ground was right in refusing to entertain the summons.

By s. 2 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), the Master of the Rolls ceases to be a judge of the High Court and becomes a judge of the Court of Appeal only; but he is to retain all the powers and privileges belonging to his office as Master of the Rolls, "and all other duties of the said office except that of a judge of Her Majesty's High Court of Justice." He therefore still has the jurisdiction, unless it was transferred to the High Court by the Act of 1873. Whether that be so or not, the appellant's summons ought to have been taken out in the Chancery Division, and the matter would be dealt with by the same person, namely, a registrar of that division.

Crump, Q.C., replied.

[After hearing the legal arguments, the Court of Appeal adjourned the case for a discussion of the merits of the application, and directed that affidavits should be filed by the parties. The further hearing took place on February 28, but as the discussion was then confined to the questions of fact raised by the affidavits which had been filed, it is unnecessary, for the purposes of this report, to state it further.]

Cur. adv. vult.

1888

IN RE POLLARD.

March 22. LORD ESHER, M.R. In this case the Court are agreed as to the result of the appeal, but there is a difference of opinion as to the mode of arriving at that result, and I will therefore state the reasons which have influenced me. The appellants took out a summons before a master of the Queen's Bench Division for delivery of a solicitor's bill of costs in respect of work no part of which had been transacted in any court of law or equity. The master refused to order delivery of the bill on the ground that he had no power to entertain the summons. Field, J., at chambers, agreed with that view, and the Divisional Court concurred with the decision of the learned judge. An appeal was then brought to this Court. The question depends in part upon the true construction of the Solicitors Act, 1843, s. 37; afterwards upon the effect of the Judicature Act, 1873, s. 16, and afterwards upon the effect of the Supreme Court of Judicature Act, 1881, s. 2. In order to understand the meaning of the Solicitors Act, 1843, s. 37, it is necessary to consider the position of the Lord Chancellor and of the Master of the Rolls at the time that Act was passed. I am of opinion that the Master of the Rolls had to perform duties in two capacities; first, duties as a judge of the Court of Chancery, and secondly, independent duties arising from his office as Master of the Rolls. He had separate chambers, which formed no part of the offices of the Court of Chancery. As Master of the Rolls he had the custody of the rolls of solicitors and attorneys, and great and independent powers and duties were vested in him with respect to their admission, and in other respects. He exercised that part of his jurisdiction as a wholly independent jurisdiction, without being subject to control of any kind, and without being subject to an appeal to any other Court. He might modify the position of a solicitor who had not taken out his certificate, and allow or forbid him to take it out, and his action in that respect was wholly independent of the jurisdiction of the Court of Chancery or the Lord Chancellor, and was not subject to an appeal to any other Court. He had, therefore, an independent jurisdiction with respect to attorneys and solicitors, and at the present time he continues to exercise a great part of that jurisdiction without being subject to any appeal. As a judge of the Court of Chancery he had the same jurisdiction as

1888

IN RE POLLARD.

Lord Esher, M.R.

the Vice-Chancellors had—though there was this difference, that they acted as the deputies of the Lord Chancellor, which he never did, though, as a judge of the Court of Chancery, he was, of course, subject to the jurisdiction of the Lord Chancellor. Taking all this into account, it seems to me that the words used in s. 37 were intended to apply having regard to the state of things then existing with respect to the power and authority of the Lord Chancellor and the Master of the Rolls. The section provides that, upon the application of the person chargeable upon a solicitor or attorney's bill, "it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or the Master of the Rolls, and in case any part of such business shall have been transacted in any other court, for the Courts of Queen's Bench, Common Pleas, Exchequer, &c., or any judge of either of them, to refer the bill for taxation of costs: Provided also, that it shall be lawful for the said respective Courts and judges in the same cases in which they are respectively authorized to refer a bill, which has been so as aforesaid delivered," to order delivery of the bill by the attorney or solicitor. Now, in the first place, it seems to me that you would never expect in an Act of Parliament to find a "Court" described by naming two particular judges of the Court, leaving out all mention of the Court. If it was intended to describe the Court of Chancery, you would expect to find it spoken of as the "High Court of Chancery and the judges thereof." It must be wrong, I think, to read the words "the Lord High Chancellor or the Master of the Rolls," as describing the Court of Chancery. It is, in my view, clear that those words were used for the very purpose of shewing that the jurisdiction was given, not to the Lord Chancellor and the Master of the Rolls as judges of the Court of Chancery, but in their official capacities as Lord Chancellor and Master of the Rolls respectively. The Vice-Chancellors were appointed as the Lord Chancellor's deputies to help him—not, of course, in his political office—and they could and did act for him, but they

never could or did act for the Master of the Rolls. Where s. 37 is speaking of business transacted in the Court of Chancery, you find words clearly applying to that court by name, but where the business is not transacted in any court, it would seem almost certain that the legislature did not intend to give jurisdiction to the Court of Chancery, there being no summons or petition before the Court in the matter. I am of opinion, therefore, that when the Act is dealing with business not transacted in any court, the jurisdiction is intended to be given to the Lord Chancellor and the Master of the Rolls in their independent official capacities, and not as judges of the Court of Chancery; and this was so in practice—the jurisdiction was exercised upon petition to the Lord Chancellor or to the Master of the Rolls, though, no doubt, the matters in question might have been brought before the Vice-Chancellors acting for the Lord Chancellor. It is said that the proviso, which speaks of the "said respective Courts and judges," shews that it was intended to give the authority to the Court, and to judges as members of it, but I think that those were the natural words to use, because particular "Courts" were referred to in the former part of the section, with respect to work done in the courts. In speaking of "Courts," therefore, the proviso meant the Courts to which authority had been given in respect of work done in those courts, and in speaking of "judges" the proviso meant the judges, namely, the Lord Chancellor, the Vice-Chancellors acting for him, and the Master of the Rolls, to whom jurisdiction had been given in respect of work done in the Court of Chancery, and in respect of work not done in any court. The interpretation which I have put upon s. 37 has, I believe, been invariably acted upon since the Act was passed.

The next question is, does the Judicature Act, 1873, alter that state of things? Sect. 16 provides that there shall be transferred to the High Court of Justice the jurisdiction which was vested in "the High Court of Chancery, as a common law court as well as a court of equity, including the jurisdiction of the Master of the Rolls as a judge or master of the Court of Chancery," but not including (it is to be observed) his jurisdiction as holding the office of Master of the Rolls. If my interpretation of the Solicitors Act, 1843, be right that the Master of the Rolls had

1888

IN RE POLLARD.

Lord Esher, M.R.

two jurisdictions—one in respect of his office as Master of the Rolls, and the other in respect of his being a judge of the Court of Chancery—then it is clear that the jurisdiction which he exercised, not as a judge of the Court of Chancery, but as Master of the Rolls, is not transferred by s. 16 of the Judicature Act, 1873, but is still retained. If that be so, what is the effect of the Supreme Court of Judicature Act, 1881? As far as I have gone at present the jurisdiction which the Master of the Rolls had, acting, not as a judge of the Court of Chancery, subject to the control of the Lord Chancellor, but in his own right, not subject to any control, has not been touched by the statutes I have referred to. By s. 2 of the Supreme Court of Judicature Act, 1881, "after the passing of this Act the present and every future Master of the Rolls shall cease to be a judge of Her Majesty's High Court of Justice, but shall continue by virtue of his office to be a judge of Her Majesty's Court of Appeal, and shall retain the same rank, title, salary, &c., and all other powers, privileges, and disqualifications now and heretofore belonging to the said office of Master of the Rolls, and all other duties of the said office except that of a judge of Her Majesty's High Court of Justice."

By the Judicature Act, 1873, as I have pointed out, that part of the jurisdiction of the Master of the Rolls which he had as a judge of the Court of Chancery had been transferred to the High Court. He had become by virtue of that section a judge of the High Court instead of the Court of Chancery. All that s. 2 of the Act of 1881 does is to take away his jurisdiction as a judge of the High Court, but it does not touch the jurisdiction he had, not as a judge of the High Court, but as Master of the Rolls. That a great many of the duties and powers with respect to solicitors exist and are exercised by the Master of the Rolls at the present time cannot I should think be doubted. They have been and are so exercised since the passing of the Judicature Acts without appeal, and why? Because he has a jurisdiction in respect of his office as Master of the Rolls, independently of his having been a judge of the Court of Chancery or of the High Court of Justice. The words of s. 2 of the Act of 1881 that he "shall retain all other powers and privileges now and heretofore belonging to the said office of the Master of the Rolls, and all

1888

IN RE POLLARD.

Lord Esher, M.R.

other duties of the said office except that of a judge of the High Court of Justice," assume that he had duties other than those of a judge of the High Court. It cannot be contended that he has such duties as Master of the Record Office. There is hardly anything to which those words can apply except the jurisdiction which the Master of the Rolls exercises with respect to solicitors, which jurisdiction includes the present case. I am of opinion that he can exercise that jurisdiction now, though it has been in fact exercised by the principal registrar of the Chancery Division. Whether I am right or wrong in my view of the statutes, the jurisdiction will be exercised by precisely the same person in precisely the same way. Formerly, where a summons was taken out in respect of non-contentious business, it would go to one of the Vice-Chancellors as representing the Lord Chancellor; and I am of opinion that, there being nothing to the contrary in the rules, the judges of the Chancery Division could properly still exercise it as representing the Lord Chancellor. I am of opinion that the Judicature Acts never intended to transfer any jurisdiction from an office, which remained in existence after those Acts were passed, to any other office or Court. If the jurisdiction of the Lord Chancellor and Master of the Rolls is taken away in this case, it is the only case in which the jurisdiction has been taken away, the offices being still in existence.

I am, therefore, of opinion that the master had no jurisdiction to entertain, and was right in refusing to entertain, the summons, and that the decisions of the learned judge and the Divisional Court were right. I think, therefore, that this appeal ought to be dismissed with costs.

The following judgment of Fry and Lopes, L.JJ., was read by

FRY, L.J. In this case persons alleging themselves to be clients of Mr. Pollard, a solicitor, have taken out a summons in the Queen's Bench Division for delivery by him of his bill of costs in respect of business alleged to have been done for them, of which no part was transacted in any court of law or of equity. The Divisional Court have rejected the application on the ground of want of jurisdiction.

The application is made under the provisions of the 37th sec-

1883

IN RE POLLARD.

Fry, L.J.

tion of the statute 6 & 7 Vict. c. 73. By that section on the delivery of a bill of costs power was given to the Lord Chancellor and the Master of the Rolls to refer the bill to taxation in case the business charged for, or any part of it, had been (1) transacted in the High Court of Chancery or in any other court of equity, or (2) in bankruptcy, or (3) in lunacy, or (4) in case no part of such business had been transacted in any court, which is the case of the bill now in question. A similar power was given to the Common Law Courts of Westminster and the Court of Pleas at Durham, or any judge of either of them, to refer bills relating to business transacted in any other courts, i.e., courts not of equity, bankruptcy, or lunacy. The enactment went on to provide that the Court or judge making such reference might restrain the solicitor from suing pending the reference; and, further (and this is the portion of the section invoked by the present application), it gave the "said respective Courts and judges," in the same cases in which they were respectively authorized to refer a bill delivered, power to make an order on the solicitor or attorney for delivery of his bill.

This statute was only an enlargement of a jurisdiction over solicitors which existed previously, and certainly was exercised by the High Court of Chancery over solicitors, who like attorneys were officers of court. In our opinion the powers thus given by statute were given to the Lord Chancellor and Master of the Rolls as judges; the clause vested in them judicial powers, e.g., of making orders and restraining actions, and any breach of these orders would have been a contempt of Court; the clause vested in them judicial discretions, e.g., in respect of the directions and conditions with and subject to which taxation was to be directed after a bill had been delivered for more than a month. Moreover, in the very words giving the powers of restraining actions, of imposing conditions on taxation after a month, and of ordering the delivery of a solicitor's bill, the Lord Chancellor and Master of the Rolls are included in the general words "Courts and Judges." Unless under the description of judges they never took any of these powers.

The jurisdiction thus vested in the Lord Chancellor and Master of the Rolls was before the passing of the Judicature Acts

exercised in this way: orders under the section in question were divided into two classes, first, orders of course where there was no dispute, and no special circumstance requiring the exercise of a judicial mind; and secondly, orders not of course, as where there was some matter in dispute, or some special circumstance that demanded attention. Orders of course were made on petitions of course by the secretary of the Master of the Rolls: special orders were made by the Master of the Rolls or any of the Vice-Chancellors (who by their appointment were bound to assist the Lord Chancellor in the discharge of his judicial duties) on summons in chambers (2 Danl. Ch. Prac. 5th ed., 1734; *Re Inderwick.* (1))

Thus matters stood at the passing of the Judicature Act, 1873. By the 16th section of that Act there was transferred to and vested in the High Court the jurisdiction then vested in or capable of being exercised by the Court of Chancery as a Court of Equity, including all powers given to the Court of Chancery, or to any judge of that Court by statute. The jurisdiction and powers conferred by the statute 6 & 7 Vict. c. 73, on the Lord Chancellor and the Master of the Rolls are, we think, aptly described by these words; and consequently we are of opinion that the power of ordering the delivery of a bill for business done in the Court of Chancery, or not done in any court, was taken out of the Lord Chancellor and the Master of the Rolls as judges of the late Court of Chancery, and was vested in the High Court, and in the Lord Chancellor and the Master of the Rolls as members of that Court.

If it were not so vested in the High Court, the judges of the Chancery Division have no power to make orders for taxation of bills for business done in the Chancery Division or done out of court, and the orders of this kind which have been made daily are ultra vires.

Thus matters stood till the passing of the statute of 1881, under which the Master of the Rolls ceased to be a member of the High Court, and consequently lost the power he had previously possessed of making original orders of the High Court, including the power of making such orders under the Solicitors

(1) 54 L. J. (Ch.) 72.

1888

IN RE POLLARD.

Fry, L.J.

Act. The 24th section of the Act of 1881 saved to him the disciplinary powers over solicitors which he possessed in common with the chiefs of the Common Law Divisions, but contained no saving of the powers to refer to taxation or to direct delivery of bills of costs.

Under the provisions of Order LXII., r. 18, the duties which were performed by the secretary of the Master of the Rolls, when he was a judge of the High Court, in making orders of course under the Solicitors Act are now vested in the registrar of the Chancery Division. The order sought in the present case involving a question in dispute, namely, the retainer by the applicants, could not have been properly made by the registrars of that Division.

For the reasons given we are not able to agree with the conclusions of the Divisional Court that the original power to order the delivery of a solicitor's bill is still vested in the Master of the Rolls; on the contrary we are of opinion that it has been transferred to the High Court, and may be exercised by any judge of that Court.

But, though we hold that the master and judge of the Queen's Bench Division had jurisdiction to make the order, we are of opinion that the application was irregular. Under s. 34, sub-s. 2, of the Judicature Act, 1873, the business to be done under the Solicitors Act, so far as it had previously been exercised by the Court of Chancery, was assigned to the Chancery Division as a matter under an Act of Parliament by which exclusive jurisdiction in respect of the matter had been given to the High Court of Chancery or the judges thereof.

The applicants were therefore irregular in their application, and considering the well known practice of applying for orders of this description to the judges of the Chancery Division, we think their conduct in applying to the master of the Queen's Bench Division blameworthy. But our sense of the impropriety of the applicants' conduct is increased by the fact that the application has been made after a bill of costs has been in fact delivered, though not to the applicants, and pending an action in which the question of the retainer is raised for decision. In short the application appears to have been made to a tribunal

1888

IN RE POLLARD.

Fry, L.J.

and under circumstances which create great doubt of its bona fides.

Under these circumstances we think that the proper course will be to allow the applicants to obtain the leave of the President of the Chancery Division, within fourteen days from to-day, to transfer the matter to the Chancery Division. If that leave be obtained the summons will be transferred, but all further proceedings in it will be stayed till after the trial, or till some order to proceed is made by the judge of the Chancery Division to whom the matter may be attached. When the trial has taken place the judge will know how to deal with the merits of the question in controversy. If the leave to transfer is not obtained by the applicants no order should be made.

As the applicants have applied to the wrong Division, and as they have in our opinion no present right to the order which they seek, we think that, notwithstanding the modified order which we give them, they ought to pay the costs of this appeal.

Order accordingly.

Solicitors: *Stevens, Bawtree & Stevens; S. R. Pollard.*

W. A.

MULLENEISEN *v.* COULSON AND ANOTHER.

March 23.

County Court—Practice—Remitted Action—Parties—Power of County Court Judge to add Defendant—County Courts Act, 1867 (30 & 31 *Vict.* c. 142), s. 10.

Where an action has been remitted for trial in the county court under s. 10 of the County Courts Act, 1867, the county court judge has no power to add a defendant without his consent.

MOTION by way of appeal from the decision of A. L. Smith, J., at chambers.

Action for an illegal distress, in which the plaintiff claimed 150*l.* damages. The action was originally brought in the Queen's Bench Division against the defendant, Coulson, alone. The writ was issued on November 3, 1886. Upon February 9, 1887, the defendant obtained an order, under s. 10 of the County Court Act, 1867 (30 & 31 Vict. c. 142), that the action be remitted for trial before the County Court of Middlesex, that order being made upon an affidavit by the defendant that the plaintiff had

1888

MULLENEISEN v. COULSON.

no visible means of paying the defendants' costs should a verdict be not found for the plaintiff.

When the case came before the county court judge, he adjourned it, and made an order giving the plaintiff liberty to amend the pleadings by adding Strousberg as a defendant, which the plaintiff did accordingly.

At the final hearing the plaintiff alone appeared, and the county court judge gave judgment for him against both defendants for 80*l.* and costs.

A. L. Smith, J., at chambers, ordered that a writ of prohibition be issued to prohibit the county court from proceeding on the judgment so far as it affected Strousberg.

The plaintiff appealed.

Overend, for the plaintiff. When the action had been remitted to the county court, the County Court Rules, 1886, applied to it, and by Order XIV., r. 2, of those rules the county court judge had power to add Strousberg as a defendant. The action must be either in the High Court or in the county court, and if it remained in the High Court, there was power to add Strousberg as a defendant under Order XVI. of the rules made under the Judicature Acts. The order of the learned judge at chambers was therefore wrongly made.

G. S. Bower, for the defendant Strousberg. The county court judge had no jurisdiction to add Strousberg as defendant. By s. 10 of the County Courts Act, 1867, in actions remitted under that section the county court "shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed by a memorandum signed by them that the said county court should have power to try the said action, and the same had been commenced by plaint in the said county court." It is clear that the expression "both parties" means the original parties to the action before it was remitted; and no agreement between the original parties could give the county court jurisdiction to add a new defendant.

[HAWKINS, J. If Strousberg had originally been made a defendant, he could have appeared and objected to the action being remitted.]

Yes; and it is clear that the County Court Rules of 1886 only give power to add a defendant where the action has been brought in the county court, because by Order XIV., r. 12, when a defendant is added, notice is to be served upon him, and the order, "together with a copy of the summons," must accompany it. The rules only deal with matters of procedure: if they assumed to give jurisdiction they would be ultra vires. Further, the provisions with respect to the service of the notice were not complied with in this case.

MANISTY, J. This case raises a question which, so far as I know, has not been decided before. I do not purpose to give any judgment on the point as to the service of the notice upon the defendant Strousberg. The substantial question is whether or not, where a case has been remitted under s. 10 of the County Courts Act, 1867, the judge of the county court has power to add a defendant against his will. Sect. 10 provides that it shall be lawful for any person against whom an action of tort has been brought in a superior court to make an affidavit that the plaintiff has no visible means of paying the defendant's costs, should a verdict not be found for the plaintiff, and thereupon a judge of the court in which the action is brought "shall have power," unless the plaintiff complies with certain specified conditions, to make an order "that the cause be remitted for trial before a county court." The power given to the judge is only to be exercised if the defendant asks that it should be exercised; but the defendant, Strousberg, in this case has not asked for the exercise of that power. The "cause" referred to in the section is the cause between A. and B. in the superior court, and the order to remit is to be made in respect of that cause, but the order here does not include the name of the person who has been added. The section goes on: "and the county court so named shall have all the same powers and jurisdiction with respect to the cause" (i.e. the cause between A. and B.) "as if both parties" (A. and B.) "had agreed by a memorandum signed by them that the said county court should have power to try the said action, and the same had been commenced by plaint in the said county court." Here the person added cannot be taken to have agreed.

1888

MULLENEISEN v. COULSON.

In fact he never did agree. It is obvious that the legislature cannot have meant that by reason of something which is to be deemed to be an agreement between A. and B., C. could be added as a defendant against his will. Upon that ground I am of opinion that the appeal fails.

HAWKINS, J. I am of the same opinion. The action was brought in the superior court for a tort, and the plaintiff claimed as damages 150*l.*, a sum in respect of which the county court would have no original jurisdiction whatsoever. Upon the application of the then defendant the action was remitted for trial in the county court under s. 10 of the County Courts Act, 1867; and then, upon application made by the plaintiff to the county court judge, an order was made adding Strousberg as a defendant, though he objected to any such order being made. He maintains his objection here, and says, in effect, "This is an action over which originally the county court had no jurisdiction whatever. If the action had been brought, as it might have been, against me in the superior court, I could have objected to its being remitted, and an application by my co-defendant to have it remitted would not have been granted if I had so objected." I think that he is right. If the original plaintiff and defendant in the action had signed a memorandum agreeing that the county court should have jurisdiction, they could not possibly have given the county court jurisdiction to try the plaintiff's claim against the present applicant for a prohibition. No agreement between the original parties could confer a jurisdiction on the county court with respect to third parties which it did not originally possess. In my opinion an action remitted to the county court under s. 10 becomes a county court action for all purposes as between the parties to it at the time it was remitted, but the Act never intended to give the county court jurisdiction to add a defendant against his will when the county court had no original jurisdiction over the action. The appeal must be dismissed with costs.

Motion dismissed.

Solicitor for the applicant: *W. Mitchell.*

Solicitor for the plaintiff: *G. W. Churchley.*

W. A.

TAYLOR *v.* TIMSON. 1888

Jan. 11, 16.

Ecclesiastical Law—Churchwarden—Right of Inhabitant to attend Divine Service in Church—Right of Churchwarden to prevent an Inhabitant from attending Service—Jurisdiction of Temporal Courts.

There is no right on the part of a churchwarden forcibly to prevent an inhabitant of a parish or district from entering the church for the purpose of attending service, even though the churchwarden may be of opinion that he cannot be conveniently accommodated.

The statute 5 & 6 Edw. 6, c. 1, s. 2, having imposed a general duty to go to church, which still is binding upon members of the Church of England, has conferred a correlative general right to go to church on those who are so obliged to go.

The temporal Courts have jurisdiction over an action against a churchwarden for forcibly preventing an inhabitant from entering the church for the purpose of attending divine service.

ACTION tried before Stephen, J., without a jury.

The statement of claim, after setting out that the plaintiff was a parishioner of the parish of Eling in Hampshire, and an inhabitant of the district chapelry of Netley St. Matthew within that parish, and that the defendant was a churchwarden of the said district chapelry, went on to allege that on Sunday, March 6, 1887, the plaintiff went to the church of St. Matthew, which was the church assigned to the district chapelry, for the purpose of attending divine service, and that while he was passing through the gate of the churchyard for that purpose the defendant assaulted him and prevented him by force from proceeding through the gate or entering the church. The plaintiff claimed damages for the assault, a declaration that he was entitled to be admitted to the church at all times when divine service was being celebrated, and an injunction to restrain the defendant from preventing him from entering the church for the purpose of attending divine service.

The defence set out that the plaintiff was a boy in the Hampshire Reformatory, which contained between eighty and ninety boys; that on the day in question the plaintiff and the other boys in the reformatory came to the church for the purpose of occupying seats or places at the morning service; that the authorities of the reformatory had been previously informed by the

1888

TAYLOR v. TIMSON.

churchwardens that the boys could not be admitted to the church for that purpose; and that the defendant in the exercise of his duty as a churchwarden, and as he had a right to do, prevented the plaintiff from entering the church, using no more force than was necessary. The defence then proceeded in paragraph 4 as follows:—"The defendant justifies his act on one or other of the following grounds:

"(1.) If, as alleged, the plaintiff with the other boys in the said reformatory is entitled as a parishioner or inhabitant of the said district chapelry to attend the services at the church, the defendant says that the said church is capable of accommodating about 305 persons, and that the population of the said district chapelry is (exclusive of the boys at the said reformatory) about 1100; that the churchwardens, exercising the discretion vested in them by virtue of their office, were of opinion that for want of sufficient room in the said church seats or places could not be found for or assigned to the boys at the said reformatory, and that accordingly the churchwardens notified the authorities of the reformatory, and the defendant prevented the plaintiff entering the said church as aforesaid.

"(2.) The plaintiff being an inmate of a reformatory, under detention and under sentence for a felony, had no right entitling him to occupy a seat or place in the said church during the services held therein."

The reply joined issue on the defence, and objected that the matters alleged in paragraph 4 afforded no justification in law for the assault complained of.

Jelf, Q.C., and *R. S. Wright*, for the plaintiff.

Jeune, for the defendant.

The facts of the case were not in dispute; but upon the question of the right of the defendant to prevent the plaintiff from entering the church, the following cases were cited; *Groves* v. *Rector of Hornsey* (1); *Walter* v. *Gunner* (2); *Pettman* v. *Bridger* (3); *Fuller* v. *Lane* (4); *Nunn* v. *Varty* (5); *Freeland* v. *Neale* (6);

(1) 1 Hagg. Cons. 188.
(2) 1 Hagg. Cons. 314.
(3) 1 Phill. 316.
(4) 2 Addams, 419.
(5) 3 Cur. 352.
(6) 1 Rob. 643.

Reynolds v. *Monkton* (1); *Byerley* v. *Windus* (2); *Burton* v. *Henson* (3); *Asher* v. *Calcraft* (4); *Rex* v. *Mashiter* (5); *Corven's Case* (6); Gibson's Codex, tit. 9, c. 4.

STEPHEN, J. This case raises a question of general and public importance. The facts are shortly these. The plaintiff, who is a boy in a reformatory, sues the defendant, the churchwarden of the parish in which the reformatory is situate, for an assault, which consisted in this, that the defendant, as the plaintiff was entering the gate of the churchyard with a view of attending service in the church, laid his hand on him and pushed him back, thereby preventing him from attending the church, and committing what in law amounted to an assault, unless it can be justified. From the pleadings it appears that no question could be raised or was intended to be raised about the facts; there no doubt was a technical assault committed for the purpose of testing the right of the churchwarden to prevent the boy from attending service, and it is justified on the grounds set forth in the defence. There is no question as to excess in the force used; the matter is simply one of trying a legal right.

The legal right alleged on behalf of the defendant is this: a right is claimed on the part of the churchwarden—I take particular notice of that, because nothing is said here about the incumbent of the church, nor is it alleged that he was acting by the authority of the incumbent or as his agent—to prevent a person from entering the church if, in the opinion of the churchwarden, there is no convenient seat for him to occupy there, or if it is not likely that there will be a convenient seat. The first observation that I have to make upon that state of things is, that it is a right which I should not be disposed to hold to exist unless it were supported by very distinct authority; the burden of proving a right of this kind must lie on the person alleging it.

I should observe in the first place that primâ facie a churchwarden has no authority whatever outside the church. This is shewn by the power given by the unrepealed statute of Mary

(1) 2 M. & Rob. 384.
(2) 5 B. & C. 1.
(3) 10 M. & W. 105.
(4) 18 Q. B. D. 607.
(5) 6 A. & E. 153.
(6) 12 Rep. 105.

1888

TAYLOR v. TIMSON.

Stephen, J.

(1 Mary, sess. 2, c. 3, s. 4) to churchwardens to arrest persons committing certain specified offences in churchyards, and by the fact that in the Act which abolished ecclesiastical suits against laymen for defamation and brawling churchwardens were specially empowered to arrest brawlers in churchyards (23 & 24 Vict. c. 32, ss. 2, 3). The churchwarden in the present instance stood at the gate of the churchyard, although he obviously had no authority there, except for the purpose of preserving order. But that would be a very narrow ground to decide the case upon. I think, however, that it would have been precisely the same—although it would have been freed from some part of the technical objection which applies to it—if he had stood inside the church at the door and there prevented the boy from entering. The question then is whether there is a right on the part of a churchwarden forcibly to prevent (using what force may be necessary for the purpose) a person who at any rate is an inhabitant of the district from entering the church for the purpose of attending divine worship. I say nothing as to the right of the incumbent, assuming him to be, as in most cases, the owner of the freehold of the church; it is unnecessary that I should, and in a case like the present I desire to go no further than I am bound to go. But I have to decide the question whether a churchwarden has a right forcibly to prevent a person from entering the church, such person being admittedly an inhabitant of the parish, on the ground that he (the churchwarden) is honestly of opinion that he could not be conveniently accommodated in the church.

On a variety of grounds I am of opinion that a churchwarden has not that right, and that in laying his hands on the boy on the occasion in question and for the purpose for which he did Captain Timson committed a technical assault which he has failed to justify. I am by no means sure that I might not content myself with saying that I hold this upon the ground that the defendant had no interest in the freehold of the churchyard or of the church itself, and that such an act as he has done ought, if done at all, to be done by the clergyman. It is not alleged here that the clergyman did it, although there is no reason to think that Captain Timson acted in spite of or in opposition to the clergyman; but I think that for obvious reasons the latter

was right in avoiding any personal intervention in such a matter. Let us consider this question a little more closely. The proposition that the churchwarden has the right contended for involves the proposition that whoever has a right to distribute the seats in the church has a right to exclude from the church persons for whom no seats are provided. Nothing less than this would satisfy the contention of the defendant, but I think it is obvious that such a contention cannot be supported. If it could be, it would come to this; the churchwarden would have a right to say in the first place how many the church could conveniently accommodate; he might say that it would accommodate a thousand people, but that, as there were two thousand inhabitants in the parish, he was entitled not merely to say that one thousand and no more should attend the church, but also to exercise his discretion and say which thousand persons should attend and which thousand should not; and he might further think himself entitled to form a list in whatever order he pleased of the favoured persons and stand at the door and tell a person coming to church whether he could or could not come in. If asked his reason by any one so prevented from entering the church, the churchwarden might reply that other people might want to come in whom in his discretion he considered more worthy, and that therefore if he did not peremptorily refuse to admit him he must order him for a time to stand aside. I must say that a churchwarden ought not to be entitled to exercise such an authority, unless he can very definitely indeed prove that he is authorized by law to do so. In my own experience I never heard of such a right being exercised, and no authority has been cited to me on behalf of the defendant to justify it. I think, therefore, that the proposition has not been justified, and for my part cannot establish by any judgment of mine that such a right exists.

I think that is decisive of the case, but as the question is one of importance I wish to go into it somewhat more at large. If the argument on behalf of the defendant were reduced to its syllogistic form the major proposition would be this; whoever has a right to distribute seats has a right to exclude persons for whom there are no seats; a churchwarden has a right to distribute seats, therefore a churchwarden may exclude persons for whom

1888

TAYLOR v. TIMSON.

Stephen, J.

in his judgment there are no seats. The major proposition of this argument appears to me to be open to the difficulty which I have suggested, and therefore I deny it. But there are other objections to it, and these I may now mention. Conceding the churchwarden's right to distribute seats, I have yet to learn that he has a right to say that people shall not stand in the aisle. No authority has been brought before me to shew that the mere fact that there is no room for sitting in the church gives the churchwarden a right to turn out a person who behaves with propriety, but who, because he cannot get a seat, stands up. Everybody knows cases in which for some reason or other a service is peculiarly popular. Suppose that more people attend such a service than can sit down, and that one of those present is willing to stand for the sake of listening to the sermon, or of honouring a particular festival, or even for the sake of hearing especially good singing, why should not he do so? I have heard of no authority which says that a man behaving with perfect propriety under such circumstances is liable to be forcibly removed by the churchwarden, and I think that the consequences of the assertion of any such right by a churchwarden might be an action in which the damages would be far from nominal.

I will put another case. Suppose a churchwarden thinks in his discretion that a particular pew can hold only six people. A man goes into the church and finds the pew with six people in it, but the person to whom the pew is appropriated, not liking to see his neighbour standing, when by a little crowding he can make room for him, takes him in. Is the churchwarden to preclude a man from the chance of being accommodated in this way? and can he say that in the exercise of his discretion he will allow no person to have more than six in his pew? That I think is a very harsh kind of power, and I cannot think that a churchwarden has a right to exercise it. Yet in the present case he has exercised it by preventing the plaintiff from entering the church.

So much for the major proposition of this argument. Now I come to the minor one, which is that the churchwardens have power to distribute the seats, on which I do not think it is necessary for me to give any opinion. I agree with the

contention of the defendant that this is essentially a spiritual question, to be decided in a spiritual court, and I do not wish to interfere with those whose duty it is to decide such questions.

I have carefully gone through all the authorities which have been cited by the defendant's counsel, but to my mind none of them come within a measureable distance of this case, and I will say why I consider them irrelevant. The first was *Groves* v. *Rector of Hornsey* (1), which was a case of a grant of a faculty for erecting a gallery in a church, but it decided nothing whatever; it merely indicated the principle upon which the Ecclesiastical Court would exercise its discretion as to granting the faculty. *Walter* v. *Gunner* (2) certainly is an authority for shewing that a parishioner has a right to a seat in the church, but it does not shew anything at all as to who is a parishioner, and still less as to who is not a parishioner. It merely says (at p. 319) that every man who settles as a householder has a right to call on the parish for a convenient seat. There are other expressions which seem to indicate that any inhabitant is primâ facie a parishioner, but I do not think that that is a matter upon which any stress should be laid, or that it decides anything as to the right of persons to resort to a church who are not entitled to seats in a church. Then came *Pettman* v. *Bridger* (3), which raised the question of the title to a pew, and which shews that the possessory right to a pew is a sufficient title against a mere disturber who cannot shew any right whatever. But this is far wide of anything which is intended to be supported in the present case. Then came the well-known case of *Fuller* v. *Lane* (4), which again was a question as to the grant of a faculty; it contains incidentally a discussion as to the law with regard to pews, delivered by Sir John Nicholl, which certainly is entitled to every respect, and against which I have not a word to say. But I would remark that it appears to me to be rather a dictum of Sir John Nicholl than an absolute legal decision. It says in general terms that the churchwardens have the right, as representing the ordinary, of distributing pews; far be it from me to say that they have not. *Nunn* v.

(1) 1 Hagg. Cons. 188.
(2) 1 Hagg. Cons. 314.
(3) 1 Phill. 316.
(4) 2 Addams, 419.

1888

TAYLOR v. TIMSON.

Stephen, J.

Varty (1) turns on the interpretation of a very special Act of Parliament as to rating people in a new parish. *Freeland* v. *Neale* (2) merely held that service in a collegiate chapel was a public reading of prayers, and has nothing to do with the present case. I understood Mr. Jeune to argue that these cases established the proposition that no one but a parishioner, in the sense of a householder living in the parish itself, together with the inmates of his house, was entitled to a seat in the church. I leave that proposition entirely to the Ecclesiastical Courts. It does not seem to me, even if it is conceded for the sake of argument, to shew that a person living in the parish is not entitled, or has not a right, actually to present himself in the church, and that the churchwarden has a right (which is the important thing) to exclude such a person from entering the church. The two propositions are entirely different.

There were some other cases quoted by Mr. Jeune, but they seem to me to have the effect of establishing a proposition entirely opposite to the contention, that this Court has no jurisdiction in this case. One of these cases was *Reynolds* v. *Monkton* (3), and another was *Byerley* v. *Windus* (4), which was referred to for the sake of a quotation from Gibson. The decision there was that an extra-parochial person cannot claim a seat except by prescription, and a prohibition went to the spiritual Court to give the person, who did not claim by prescription, what he wanted. But that does not appear to bear on the question now at issue.

Mr. Jeune contended, though faintly, that this Court had no jurisdiction in this case, and quoted some cases to prove it. They appeared to me to prove the contrary. *Burton* v. *Henson* (5) was quoted to shew the rights of churchwardens, and it assuredly does shew that a churchwarden has some rights. It was the case of an ex parish clerk, who, after he had been turned out of his position, insisted on staying in the clerk's seat, whereupon the churchwarden turned him out by force, and it was held that he was justified in so doing. That case shews that, if a churchwarden enforces his rights by the strong hand, he raises a question

(1) 3 Curt. 352.
(2) 1 Rob. 643.
(3) 2 M. & Rob. 384.
(4) 5 B. & C. 1.
(5) 10 M. & W. 105.

for the temporal Court as to the existence of those rights if he commits an assault in the absence of justification. I must say, however, that to tell me that any case involving an assault is not cognisable in the Queen's Bench Division is to tell me something so very strange, that unless it is proved in the clearest way, nothing would induce me to assent to it; that Division clearly has a right to take cognisance of everything amounting to an assault and to try the sufficiency of any justification which may be pleaded to it. The case illustrates the power of churchwardens in rather a curious manner, for Baron Alderson, at p. 108, quoted with approval the following passage from Hawkins' Pleas of the Crown, "Churchwardens, and perhaps private persons, may whip boys playing in church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay hands on those who disturb the performance of any part of divine service, and turn them out of church." I take that case as I find it, but I do not recommend any one to act on the whipping part of the case. All that shews to my mind quite clearly that the temporal Court not only may, but must, take cognisance of anything which involves an assault.

I now come to the case in the Year Book (Easter term, 8 Hen. 7, case No. 4, fol. 12), in which William Fitzwalter brings an action of trespass for breaking and carrying away his seat. I need not read the argument, which was upon the question whether or no the seat was affixed to the freehold; if it was so affixed, apparently the clergyman had an interest in it; if not, he had not. In the judgment Hussey, C.J., says (I translate the Norman French): "Then the parson has nothing to do with it, it was a moveable chattel. But we must consider whether this is a spiritual matter or a temporal matter, and if it is to be considered according to spiritual law or temporal law. If we hold plea of this, and if it is spiritual matter, it is not good. If the parson brings an action against the vicar for tithes, that does not lie here, and up to this time I never heard of such an action as this. If there is no prescription, there can be no seat in the church, as it seems, for the church is common to everybody, and therefore it is not reasonable that one should have his seat and that two shall stand, for no place belongs more to one than another." The words about

1888

TAYLOR v. TIMSON.

Stephen, J.

the church being common for every one are far too general to throw any light on the question as to who has a right to go there, but the fact that the Chief Justice in those days thought that standing was a natural thing in a church is a matter at any rate for notice. However, he goes on thus: "It seems that the ordinary may ordain for the gentry places convenient for them, and for the poor other convenient places. However, it seems this is a spiritual matter, and therefore if this man and his ancestors had not been in the habit of having such a seat from the time of prescription, it seems that anybody may take the seat"—I suppose that is the meaning of the original—"out of the church, and move it away for his ease and standing, for it is a common nuisance to the people who are there, for on account of such seats they cannot have standing room, by reason of such seats in the church." Then comes a part which is not usually quoted, but which is really the important part of the report:—"Purquoi il est bon estre avise de ce mater, car c'est novel mater, et bon destre aviser in exemple de touts autres," &c.—"but it is desirable to be advised about this matter, for it is a new matter, and it is good to be advised about it, as it may be example for other cases." Whether the Court ever delivered judgment does not appear. Therefore all that case comes to is this; it shews this question was discussed in the days of Henry VII. as well as at the present time, and the law appears then to have been as new as it is now. The Court would not say anything about it, except that the Chief Justice said—and this was only obiter dictum—that it seemed hard that the one seat should force several people to stand.

These authorities fail absolutely to my mind to shew that the defendant had any right to turn the plaintiff out and prevent him by force from coming into the church.

I now come to another matter. Mr. Jeune put this question—"What right had the boy to come there at all? It is commonly supposed that everybody has a right to go into a church, but he really had no right, and I want to see any authority which shews that he had any right to go into the church." That would not give the churchwarden a right to interfere. If the boy was a trespasser, he was a trespasser on the freeholder, and the free-

holder (the clergyman) must take his own view, whatever it may be, as regards bringing his action against somebody for trespassing in his church. I do not envy him that position, and I am by no means sure that Mr. Jeune's contention is correct.

The case of *Asher* v. *Calcraft* (1) was cited, and I am somewhat surprised that one of the arguments in that case was not used on behalf of the plaintiff in the present case. The argument was founded on 5 & 6 Edw. 6, c. 1, s. 2. The first part of the preamble to that Act sets forth the establishing by Edward VI. of the first Book of Common Prayer, and after saying that there had been great negligence in attendance at church, it goes on to enact that "All and every person and persons inhabiting within this realm, or any other the King's majesty's dominions, shall diligently and faithfully (having no lawful or reasonable excuse to be absent) endeavour themselves to resort to their parish church or chapel accustomed; or upon reasonable lett thereof, to some usual place where common prayer and such service of God shall be used in such time of lett, upon every Sunday, and other days ordained and used to be kept as holydays, and then and there to abide orderly and soberly during the time of the common prayer, preachings or other service of God there to be used and ministered; upon pain of punishment by the censures of the Church." That section therefore positively requires everybody, under pain of spiritual censure, to go to church on Sundays and holy days, and there to hear the service according to the form there provided. We all know that the legislation of Edward VI. was repealed by Mary; but it was revived by Elizabeth, and the provision quoted was re-enacted in almost identical words by 1 Eliz. c. 2, s. 14, with the addition that anybody who did not attend divine service was to be fined one shilling for every omission. By the Toleration Act (1 Wm. & Mary, c. 18) persons were freed from all the penalties which the earlier legislation had imposed upon them, if they went through certain forms on Sundays; and the consequence was (though it was different with regard to Roman Catholics) that people were obliged to go to church unless they came within the Toleration Act. That state of things lasted to the year 1845, when many of these matters were set right by 9 & 10 Vict. c. 59.

(1) 18 Q. B. D. 607.

1888

TAYLOR v. TIMSON.

Stephen, J.

This Act did not repeal the statute of Edward, but it did repeal the statute of Elizabeth, and it says in effect that nobody dissenting from the Church of England, whether within the Toleration Act or not, is to be liable to any censure at all, that is, any ecclesiastical censure; and that nobody at all, whoever he may be, is to be liable to any penalty for not going to church; but it leaves the provision of the Act of Edward VI. as to spiritual censure just as it was. The effect of this is that any person, be he who he may, who is not a dissenter from the Church of England, is liable to ecclesiastical censure if he does not go to church, and ecclesiastical censure, although he is not to be fined, would operate as a fine, for he might be admonished to go to church, and would be liable to pay the costs of the proceeding. Therefore, as every member of the Church of England—and the plaintiff amongst others—is bound to go to church under pain of ecclesiastical censure, it is rather a strong thing to say that churchwardens have the right to prevent them from going to church. It seems to me that by imposing a general duty to go to church, the legislature confers a general right to resort to the church on the persons whom it obliges to go. I therefore think that Mr. Jeune's challenge to find an authority for the proposition that people in general have a right to go to church is met in that manner. This boy had a right, and was to "do his endeavour," to use the words of the statute, to go to church, and though it would be a good plea for him to say that he was turned back by the churchwardens, and therefore could not go, it would not justify the churchwarden. That is, I think, the result of the whole case, that the defendant had no right to keep the plaintiff back.

No doubt there is a difficulty as to what is to happen if the church is overcrowded, as to which I say nothing. The Church of England has got on very well for a very long time indeed without deciding that question, and will probably get on very well in the future without a formal decision.

There was a question about the plaintiff being a reformatory boy; but I do not understand the defendant to say that reformatory boys or any other disreputable persons ought to be kept away from church because they are disreputable. This question was merely raised by the defendant by way of shewing that these

1888

TAYLOR v. TIMSON.

Stephen, J.

lads did not come within what he contended was the proper meaning of the word "parishioner"; the same argument would apply to soldiers and many persons whose conduct and position in life could be no reflection upon them.

I give judgment therefore for the plaintiff for one shilling damages, and costs upon the High Court scale. I make no declaration as to the rights of the parties; nor do I see any reason for granting an injunction; it could only apply to the present plaintiff, and would leave the defendant, if so inclined, free to pursue the same course with regard to any other boy in the reformatory.

Judgment for the plaintiff.

Solicitors for plaintiff: *Warren, Gardner & Murton.*
Solicitors for defendant: *Field, Roscoe, & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

April 10.

GRAHAM AND OTHERS *v.* EDGE AND ANOTHER (THE OFFICIAL LIQUIDATORS OF THE BLACKBURN AND DISTRICT BENEFIT BUILDING SOCIETY).

Company—Unregistered Company—Winding-up—Official Liquidators, Action against, in Personal Capacity—Stay of Action—Practice—Land subject to Rent-charge—Vesting Order, Effect of—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 92, 203.

An order having been made for the winding-up of an unregistered company under the Companies Act, 1862, the Court directed under s. 203 of the Act that certain land, which was vested in trustees for the company, subject to a rent-charge, should vest in the official liquidators, appointed for the purposes of the winding-up, by their official name.

The plaintiffs, the owners of the rent-charge upon such land, sued the liquidators in their personal capacity to recover arrears of the rent-charge from them as terre-tenants:—

Held, that such action ought to be stayed as being manifestly groundless.

APPEAL from the decision of the Queen's Bench Division (reported supra, p. 538), ordering that the action should be stayed.

The facts appeared to be in substance as follows:—

Certain lands were vested in trustees for the Blackburn and District Benefit Building Society, subject to a rent-charge of 52*l.* 2*s.* 9*d.* per annum, of which the plaintiffs were the owners. The said society, which was an unregistered company, was ordered

1888

GRAHAM v. EDGE.

on October 25, 1881, to be wound up under s. 199 of the Companies Act, 1862; and an order was made in the winding-up on April 21, 1882, under s. 203 of the Act, vesting the property of the society, and all property held in trust for them, in the defendants by their official names as liquidators of the society.

The liquidators took possession of the land under the order and remained in possession till 1887, when, by leave of the Court, they conveyed the land away to one Clough. They paid the rent-charge down to May, 1885, but the amounts accruing in respect of the charge from that time till September, 1887, were in arrear.

The plaintiffs brought the action against the defendants to recover such arrears. The writ was addressed to "Henry Edge, of, &c., and Thomas Hayes, of, &c., the official liquidators of the Blackburn and District Benefit Building Society," but it did not state that the defendants were sued as such liquidators, and the remainder of its terms were such as might ordinarily be used in an action against the defendants in their individual capacity.

An application having been made by the defendants to stay the action under s. 87 of the Companies Act, 1862, which was referred by the judge at chambers to the Court, the Divisional Court (Huddleston, B., and Manisty, J., the latter doubting) held that the action must be stayed as being substantially an action against a company in liquidation which had been brought without the leave of the Court.

Against this decision the plaintiffs appealed.

T. Willes Chitty, for the plaintiffs. This action does not come within the provisions of s. 87 of the Companies Act, 1862. That section provides that, where there has been an order for winding-up, no action shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court may impose. This is not an action against the company, nor is it sought in this action to render the company liable; it is an action against the defendants in their personal capacity. It is contended that the defendants, having taken possession of the land, are personally liable to an action of debt in respect of the rent-charge as terre-tenants, though

of course they would be entitled to an indemnity out of the society's assets: *Thomas* v. *Sylvester*. (1) Whether that is so or not will depend on the question what the position of the liquidators may be under the provisions of the Companies Act, 1862, with regard to unregistered companies, and particularly of s. 203, by which the property is vested in the liquidators, where, as in this case, they have elected to take possession of the property. In the ordinary case of winding up a registered company the property is not vested in the liquidator, who is merely the officer of the Court in that case: in the case of an unregistered company wound up under s. 199, where the property is vested in the liquidator, it is submitted that the liquidation is like a bankruptcy, and the liquidator is in the same position as a trustee in bankruptcy. Whether there is such a personal liability on the part of the liquidators will be the question at the trial; but the case is clearly not one where the action is within the 87th section, the action not being against the company.

[LORD ESHER, M.R. The suggestion against the plaintiffs will be that, assuming that the action is not against the company but against the defendants in their personal capacity, such an action under the circumstances alleged is obviously not maintainable, and therefore ought to be stayed in the exercise of the jurisdiction of the Court to stay actions which are frivolous because manifestly groundless.]

The question whether there is such a liability will be the question at the trial, when the facts will be ascertained; at present the exact facts are not ascertained. The possibility that it may turn out that there is no cause of action is not a ground for staying an action summarily.

[LORD ESHER, M.R. There seems to be no suggestion whatever that the defendants did anything other than what as official liquidators appointed under s. 92 to assist the Court in the winding-up they were bound to do by the order of the Court made under s. 203. Therefore the whole question turns on their position under that section.]

The plaintiffs ought to have the opportunity of trying the question whether the defendants are personally liable in the

(1) Law Rep. 8 Q. B. 368.

1888

GRAHAM v. EDGE.

usual way. It is contended that they are in the same position as a trustee in bankruptcy who has elected to take to onerous property.

[BOWEN, L.J. A trustee in bankruptcy has an opportunity of disclaiming. What election in the matter has the official liquidator?]

He need not take possession of the property. If he chooses to take possession he will, like a trustee in bankruptcy, be subject to the liabilities attaching to the property.

[LORD ESHER, M.R.:—The section under which he is appointed is s. 92, and, according to the terms of that section, he seems to be really in the position of an officer of the Court bound by its directions. Here the Court directed that the land should vest in him?]

It is contended that he would not be bound to take possession, if he could shew that the property was onerous.

[BOWEN, L.J. This is not like the case of a lease. The freehold appears to be vested in the liquidators by the vesting order. How could they divest themselves of the land except by conveying it away?]

They might have applied to the Court for leave to convey it away immediately. Here they elected to hold the possession of it from 1882 to 1887. They do not resist the making of the vesting order, they take possession of the land, and they do not apply for leave to convey it away for several years. It is contended that these facts are evidence of an election to take to the property, and the plaintiffs are entitled to try the question whether the defendants are, by such election, rendered personally liable for the arrears of the rent-charge in the usual way.

[He cited *Kemp* v. *Tucker* (1); *Ex parte Dressler* (2); *Hanson* v. *Stevenson.* (3)]

Neville, Q.C., and *Joseph Walton*, for the defendants, were not called upon.

LORD ESHER, M.R. This action is brought to recover arrears of a rent-charge alleged to be due from the defendants to the

(1) Law Rep. 8 Ch. 369. (2) 9 Ch. D. 252.
(3) 1 B. & Ald. 303.

plaintiffs in consequence of the defendants having been in possession of the land on which the rent was charged. The action is brought in such a form that, to say the least, the defendants might be rendered personally liable, and, if a judgment were obtained, it might be enforced against their private property; and the plaintiffs' counsel, at the commencement of the argument, declared that the object of the action was not to render the company or its property liable, but to make the defendants personally liable. We must treat this, therefore, in my opinion, as an action in which it is sought to render the defendants personally liable; and the question consequently arises whether there is any colour for saying that they could be so liable. No cause of action was really suggested against the defendants except that they were the official liquidators of an unregistered company in whom the land out of which the rent-charge issued was vested under s. 203 of the Companies Act, 1862; and the question, therefore, whether such action will lie, seems to me to depend on the provisions of that section. That section follows s. 199, which in substance provides that under certain conditions an unregistered company may be wound up, as if it were a registered company; and we must take it that this company came within the terms of that section, for otherwise no order could have been made vesting the land in question in the defendants as official liquidators. The only power to appoint an official liquidator or official liquidators is given by s. 92, and the position of such a liquidator is defined by the terms of that section, which states that he is to be appointed "for the purpose of conducting the proceedings in winding up a company and assisting the Court therein." In the case of an unregistered company, certain of his functions, as assisting the Court in the winding-up, are determined by the terms of s. 203. That section provides that "if any unregistered company has no power to sue and be sued in a common name, or, if for any reason it appears expedient, the Court may, by the order made for winding up such company, or by any subsequent order, direct that all such property, real and personal, including all interest, claims and rights in and out of property real and personal, and including things in action, as may belong to or be vested in the company, or to or in any

1888

GRAHAM v. EDGE.

Lord Esher, M.R.

person or persons on trust for or on behalf of the company, or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names." If the Court does so direct, I apprehend that the liquidator could not disobey the order, or say that such property should not vest in him. The section proceeds: "And thereupon the same or such part thereof as may be specified in the order shall vest accordingly; and the official liquidator or official liquidators may in his or their official name or names, or in such name or names, and after giving such indemnity as the Court directs, bring or defend any actions, suits, or other legal proceedings relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purpose of effectually winding up the company or recovering the property thereof." The meaning is, I think, that the property shall vest in the liquidator, not in his personal capacity, but in his official capacity as official liquidator appointed by the Court to assist the Court in the winding-up of the company. It is said that the defendants have elected to take to the property, and are in the same position as a trustee in bankruptcy would be. But a trustee in bankruptcy has by statute, subject to certain conditions, a power to disclaim onerous property. No such power appears to be given to the official liquidator. The property is vested in him by the order of the Court, and he does not seem to have any election in the matter: and therefore he cannot be personally liable on the ground that he has made an election. The result is, as it appears to me, that the land is not vested in the defendants personally, and therefore they cannot possibly be personally liable to pay the charge out of their own property. It being clear, in my opinion, that the action is brought to recover against them personally, and not against the company, the question is whether there is any colour for maintaining such an action. It appears to me that there is not, and, that being so, that it ought to be stayed, not under s. 87 of the Companies Act, 1862, but in virtue of the general jurisdiction of the Court to stay actions for which there is no possible colour. Whether the plaintiffs have now any other remedy by way of action against the official liquidators in their official names, and, if so, whether the leave of the

Court to bring such action would be necessary, it is not necessary to determine. For these reasons I think the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. It is clear to my mind that this is not an action against the defendants as official liquidators and in their official capacity. That is shewn, I think, by the terms of the writ, which abstains from stating that the defendants are sued as official liquidators. It merely adds by way of description or addition to their names the words "official liquidators," &c., and the terms used in the body of the writ are such as would enable judgment to be enforced against the defendants personally. If the action had been intended to be against the official liquidators as such, the form of the writ ought to have been modified accordingly. Moreover, the counsel for the plaintiffs insisted that the plaintiffs had a right to sue the official liquidators personally, and made it the foundation of his argument that the action was brought against them personally, repudiating all idea that the plaintiffs were seeking relief against the company in the action. Whether, supposing the action had been brought against the official liquidators as such, this would be a case within s. 87, and therefore one in which the leave of the Court to bring the action would have been necessary, is not, according to the view I take, a matter which we have now to determine. The action being against the defendants personally, the question arises whether there is any colour for the suggestion that they can be personally liable in such a case; for, if not, it seems to me that we ought to stay the action. The question whether there is any colour for such an action appears to me to depend entirely on the effect of s. 203 of the Companies Act, 1862, because it cannot really be suggested that the defendants have done anything but submit to the operation of that section, under which the property is vested in them by their official name. Having regard to the terms of that section, I do not think they are clothed with the property in any other than their official capacity as official liquidators subject to the directions of the Court. Therefore I do not think there can be any colour for suggesting that they are personally liable; and it follows

1888

GRAHAM v. EDGE.

that this action ought to be stayed, not exactly on the ground taken in the Court below, but because it comes within the scope of the general jurisdiction of the Court to stay actions which are obviously untenable and therefore oppressive.

Appeal dismissed.

Solicitors for plaintiff: *Pritchard, Englefield, & Co.*
Solicitor for defendants: *Needham.*

E. L.

March 2,1[22.

[IN THE COURT OF APPEAL.]

IN RE CONNAN. EX PARTE HYDE.

Bankruptcy—Bankruptcy Notice—"Final Judgment"—Stay of Execution—Garnishee Order absolute against Judgment Debtor as Garnishee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Rules of Supreme Court*, 1883, *Order* XLII., *rr.* 22, 23.

Where a creditor has obtained final judgment and a garnishee order absolute has been made against the judgment debtor as garnishee, execution on the judgment must be taken to be stayed so long as the garnishee order remains undischarged, and the creditor is not entitled to serve a bankruptcy notice on the garnishee in respect of the judgment debt, even though the debt in respect of which the garnishee order was made has been in fact paid.

APPEAL by the debtor G. H. Connan against a receiving order made against him on the petition of J. Hyde.

The act of bankruptcy alleged was the non-compliance with a bankruptcy notice.

On January 28, 1887, Hyde obtained a final judgment against Connan for 70*l.* 9*s.* 8*d.*

On July 27, 1887, W. H. Making, who was a judgment creditor of Hyde for 100*l.*, served on Connan a garnishee order nisi, attaching the judgment debt due from him to Hyde, and on August 4 the garnishee order was made absolute. It ordered Connan forthwith to pay the judgment debt of 70*l.* 9*s.* 8*d.* to Making, and that in default thereof execution might issue for the same.

On December 15, 1887, Hyde served Connan with a bankruptcy notice in respect of the 70*l.* 9*s.* 8*d.*, and with the notice Hyde's solicitor sent a letter addressed by him to Connan in which he said, "The charging orders obtained on the judgment by Mr. Hyde against you have been discharged by payment, and therefore the

1888

IN RE CONNAN. EX PARTE HYDE.

amount of the judgment debt and costs is now properly payable by you to Mr. Hyde." No evidence other than this letter that Making's debt had been satisfied was supplied to Connan, and the garnishee order had not been discharged by any order of the Court.

It was proved on the hearing of the petition that, before the service of the bankruptcy notice, Hyde had in fact paid the debt which he owed to Making.

The registrar held that Hyde was entitled to issue the bankruptcy notice, and that Connan had committed an act of bankruptcy by not complying with it, and he made a receiving order against Connan.

Stephen Lynch and *Francis Watt*, for the debtor. The petitioning creditor was not entitled under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, to serve the bankruptcy notice. The garnishee order absolute operated as a stay of execution so far as the petitioning creditor was concerned, and that stay of execution continued in force so long as the garnishee order remained undischarged by any order of the Court. At any rate the petitioning creditor could not issue execution on the judgment without first obtaining the leave of the Court to do so: Rules of Supreme Court, 1883, Order XLII., rr. 22, 23; *Ex parte Ide.* (1)

Herbert Reed, for the petitioning creditor. The rules contain no provision for discharging a garnishee order. Sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, refers to a subsisting stay of execution. If the appellant had any doubt whether Making had been paid he should have made inquiries. The petitioning creditor being the original judgment creditor, it was not necessary that he should apply for leave to issue execution. The debtor could not have safely paid Making after he had notice that Making's debt had been discharged.

Lynch, in reply.

Cur. adv. vult.

March 22. FRY, L.J. The Master of the Rolls has requested me to deliver the first judgment in this case. [After stating the facts, his Lordship continued:—] The question is whether the creditor who served this bankruptcy notice was within the meaning

(1) 17 Q. B. D. 755.

1888

IN RE CONNAN. EX PARTE HYDE.

FRY, L.J.

of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, a creditor who had obtained a final judgment against the debtor, on which execution had not been stayed. In my opinion he was not such a creditor. The garnishee order absolute, which gave the right to levy execution upon the judgment to Making, operated as a stay of execution on the judgment so far as Hyde was concerned. That order has in fact never been removed, though Hyde may have had a right to obtain its removal. But, if he had, it was his duty to apply to the Court, either under rule 23 of Order XLII., if that rule applied to the case, or under its general jurisdiction. He did nothing of the kind, so that in fact, during the whole of the seven days for which the bankruptcy notice was pending, Making might have issued execution on the judgment against Connan, and Connan would have had no answer to it, and during the same period Connan might safely have paid the debt to Making. At the time, therefore, when the bankruptcy notice was served, execution upon the judgment was stayed so far as Hyde was concerned, and he was not such a creditor as by sub-s. 1 (*g*) is entitled to serve a bankruptcy notice. In my opinion, therefore, the appeal must be allowed, and the receiving order discharged.

LOPES, L.J. The question is whether execution on the judgment had been stayed. I think the effect of the garnishee order absolute was to stay execution upon the judgment so far as the creditor who issued the bankruptcy notice was concerned. During the existence of that order he could not issue execution on the judgment. In fact he paid the garnishor (Making) his debt, but, in my opinion, when he had done that he ought to have called upon Making, by summons or otherwise, to shew cause why the garnishee order should not be discharged. As that order had not been discharged, I think Hyde was not a creditor who, under the terms of sub-s. 1 (*g*), was entitled to serve a bankruptcy notice. The receiving order must be discharged.

LORD ESHER, M.R. I agree.

Appeal allowed.

Solicitor for debtor: *George Johnson.*

Solicitors for petitioning creditor: *F. A. Foster & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

1888
Feb. 17;
March 2.

IN RE SUFFIELD AND WATTS. EX PARTE BROWN.

*Solicitor—Costs—Charging Order—Lien—"Property recovered or preserved"—Priority—*23 *&* 24 *Vict. c.* 127, *s.* 28*—Court of Bankruptcy—Jurisdiction—Rehearing—Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 104.

In an action in the Chancery Division, by one partner against another, for a dissolution of the partnership, judgment was given for a dissolution, and the appointment of a receiver of the assets of the partnership. Both the partners were afterwards adjudged bankrupt; the action was transferred to the Queen's Bench Division in bankruptcy, and the judge having jurisdiction in bankruptcy made an order under 23 & 24 Vict. c. 127, s. 28, charging the costs of the plaintiff's solicitor on the funds in the hands of the receiver. Before this order was made, the landlord of the premises in which the bankrupts had carried on their business had given notice to the receiver of a claim for rent due to him, but had not attempted to distrain. The judge was not informed of this claim before he made the order, and he subsequently made a further order by which he directed the receiver to pay the rent due to the landlord, and to pay the balance in his hands to the solicitor:—

Held, first, that the landlord, not having distrained, had no lien on the funds in the hands of the receiver in priority to the solicitor; secondly, that the charging order was not made by the judge in the exercise of his bankruptcy jurisdiction, and that he had consequently no power to rescind or vary it under s. 104 of the Bankruptcy Act, 1883.

APPEAL against an order of Cave, J., directing the receiver in an action of *Suffield* v. *Watts*, which was commenced in the Chancery Division and was afterwards transferred to the Queen's Bench Division, to pay out of the moneys in his hands a sum of 49*l.* 6*s.* 6*d.* to the bankrupts' landlord.

Suffield and Watts had carried on business in partnership. The action of *Suffield* v. *Watts* was commenced in the Chancery Division for the dissolution of the partnership and other relief, and judgment was duly pronounced dissolving the partnership, and appointing a receiver of the partnership assets. Afterwards Suffield and Watts were adjudicated bankrupts, and an order was made transferring the action to the Queen's Bench Division in Bankruptcy. On April 6, 1887, on the application of the solicitor who had acted for the plaintiff in the action, Cave, J., made an order, which was entitled in the bankruptcy, in the action, and in

1888

IN RE SUFFIELD AND WATTS. EX PARTE BROWN.

the matter of the Solicitors Act of 1860 (23 & 24 Vict. c. 127, s. 28), directing the receiver in the action, out of the moneys in his hands, to pay the amount of the taxed costs of the solicitor. The landlord of the premises in which the bankrupts had carried on their business made a claim upon the receiver for the payment of rent which was due to him. Notice of this claim had been given to the receiver before the charging order was made, but Cave, J., was not informed of the claim at the time when he made that order. The receiver afterwards applied to the Court for directions as to the application of the moneys in his hands as such receiver. On the hearing of this application both the landlord and the solicitor were represented. The landlord claimed a balance of 49*l.* 6*s.* 6*d.* as due to him in respect of rent; the solicitor's taxed costs amounted to more than 100*l.*; the moneys in the receiver's hands amounted to 84*l.* Cave, J., on January 11, 1888, made an order (entitled in the bankruptcy and in the action), directing the receiver to pay the 49*l.* 6*s.* 6*d.* to the landlord, and to pay the residue of the moneys in his hands to the solicitor towards the amount of his taxed costs. The learned judge held that the landlord was entitled to priority over the solicitor.

The solicitor appealed.

Dundas Gardiner, for the solicitor. The money in the hands of the receiver was "recovered or preserved" by means of the exertions of the plaintiff's solicitor; if the action had not been brought, and a receiver appointed, the partnership assets would have been wasted by the defendant.

Sect. 28 (1) of the Solicitors' Act (23 & 24 Vict. c. 127) there-

(1) Sect. 28 provides: "In every case in which a solicitor shall be employed to prosecute or defend any suit or proceeding in any Court of justice, it shall be lawful for the Court or judge before whom any such suit or proceeding has been heard, or shall be depending, to declare such solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such solicitor, for the taxed costs, charges, and expenses of or in reference to such suit or proceeding; and it shall be lawful for such Court or judge to make such

fore applies, and a charge declared in favour of a solicitor under that section is paramount to every other claim against the fund affected by the charge, except the claim of a bonâ fide purchaser for value without notice: *Pinkerton* v. *Easton* (1); *Bulley* v. *Bulley* (2); *Greer* v. *Young* (3); *Bailey* v. *Birchall* (4); *Dallow* v. *Garrold* (5); *Shippey* v. *Grey* (6); *Faithfull* v. *Ewen* (7). The solicitor's charge is in the nature of a claim for salvage, which is a charge upon the property salved, and is paramount to the interests of the persons entitled to it.

The landlord is not a purchaser for value without notice; he had not distrained for his rent, and is not therefore, in any better position than any other creditor of the partnership.

F. Cooper Willis, for the landlord. The landlord gave notice to the receiver of his claim for rent before the charging order of April 6 was made. Before the receiver sold the goods, from which the money in his hands had arisen, the landlord had a right to distrain upon the goods for his rent. The notice to the receiver of his claim has the same effect as if he had distrained. The landlord would have been a preferential creditor in the bankruptcy. Sect. 28 does not give the solicitor an absolute right to a charging order; the Court has a discretion. The order of April 6 has been discharged so far as it affected the landlord's priority. That order was made by Cave, J., sitting in bankruptcy, and s. 104 of the Bankruptcy Act, 1883, provides that "every Court having jurisdiction in bankruptcy may review, rescind or vary any order made by it under its bankruptcy jurisdiction." The order was made in the bankruptcy. The fund was in the Bankruptcy Court, and the solicitor came to that Court for the charging order. The order of January 11 in effect varied the charging order.

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order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right."

(1) Law Rep. 16 Eq. 490.
(2) 8 Ch. D. 479.
(3) 24 Ch. D. 545.
(4) 2 H. & M. 371.
(5) 14 Q. B. D. 543.
(6) 49 L. J. (Q.B.D.) 524.
(7) 7 Ch. D. 495.

1888

IN RE SUFFIELD AND WATTS. EX PARTE BROWN.

LORD ESHER, M.R. It is not denied that the solicitor has "preserved" property by means of the action, and therefore, if no prior claim stood in his way, he was entitled, under s. 28 of the Solicitors Act, 1860, to a charging order for the amount of his taxed costs upon the "property preserved" by means of his exertions. A charging order of this nature could only be made under that Act. The order was made by Cave, J., sitting in the Court in which he was exercising jurisdiction under the Bankruptcy Act, 1883, but he was a judge of the Queen's Bench Division, and he was also entitled to exercise all the other powers which were vested in him as a judge of the High Court, among which was the jurisdiction given by the Solicitors Act. He made the order of April 6 under the jurisdiction conferred by the Solicitors Act, and after he had once made it, and it had been drawn up and perfected, he had no jurisdiction to alter it. It was not an order made in the bankruptcy jurisdiction, and s. 104 of the Bankruptcy Act, 1883, which has been relied on, gives power to the Court of Bankruptcy to "review, rescind, or vary any order made by it under its *bankruptcy jurisdiction*." Cave, J., had no power to rehear the application, even if he had been asked to do so. But he was not asked to rehear it, and I do not think he professed to do so. But, while the charging order stood good and unimpeachable, the receiver in the action asked the Court for directions what he was to do with the money which was then in his hands—whether, in particular, the rent which was due to the landlord of the partnership premises ought or ought not to have priority over the charge which had been declared, and which was still existing, in favour of the solicitor. This question of priority might have presented some difficulty but for the fact that there is a succession of cases which, as it seems to me, have decided that, so long as a fund upon which such a charging order has been made has not been paid away to any one, the order is effectual against every one except a bonâ fide purchaser for value without notice. In *Dallow* v. *Garrold* (1) it was in terms held by the Court of Appeal that that is the effect of s. 28. That case is an express decision of the Court of Appeal, that a charging order made in favour of a solicitor under s. 28 gives him priority over

(1) 14 Q. B. D. 543.

1883

IN RE SUFFIELD AND WATTS. EX PARTE BROWN.

Lord Esher, M.R.

everyone except such a purchaser for value so long as the fund upon which the charge has been declared remains in the hands of a person over whom the Court has jurisdiction. That case adopted and approved of a previous decision of the Court of Appeal in *Shippey* v. *Grey* (1), in which the Court said that the case was concluded by the prior decision of the Court of Appeal in *Faithfull* v. *Ewen* (2). On authority, therefore, and on principle it seems to me plain that this charging order has priority over the claim of the landlord which he had not enforced by means of a distress, just as it would have priority over the claim of a judgment creditor of the plaintiff who had not levied execution. I cannot, therefore, agree with the second decision of Cave, J.

FRY, L.J. The charging order was made by Cave, J., not in his bankruptcy jurisdiction and not by reason of the bankruptcy, but by reason of his jurisdiction under the Solicitors Act, and the pendency of the proceedings in the partnership action. When Cave, J., made the order he was not informed of the claim for rent which had been made by the landlord. On a subsequent occasion, upon a motion by the receiver for directions as to the application of the money in his hands, Cave, J., gave priority to the claim of the landlord. Was it competent to Cave, J., to rehear or modify the order which he had made on April 6? I conceive that it was not. *In re St. Nazaire Co.* (3) shews that, when an order or judgment of the High Court has once been perfected, the Court has no jurisdiction to alter it. So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end. Therefore, Cave, J., had no power to rehear the matter. And in truth no application was made to him to rehear it, and, in my judgment, there was no attempt to vary the order. The subsequent order as drawn up is not entitled in the matter of the Solicitors Act.

With regard to the matter of substance, it has been argued that the landlord is entitled to priority over the solicitor by

(1) 49 L. J. (Q.B.D.) 524.
(2) 7 Ch. D. 495.
(3) 12 Ch. D. 88.

1888

IN RE SUFFIELD AND WATTS. EX PARTE BROWN.

Fry, L.J.

reason of his power of distress for rent. If, however, he does not distrain, but allows the goods which he might have taken under a distress to be applied in another way, he has no right to follow the proceeds of the goods. No other ground has been suggested for giving the landlord priority. In my opinion, the right of the solicitor to priority is made plain by the words of s. 28. I take that section to amount to a statutory declaration that, when the Court has declared a solicitor entitled to a charge on "property recovered or preserved," the charge is to have priority over the claims of every one except a bonâ fide purchaser for value without notice. Subject to that, the solicitor's charge takes priority over every other claim. This appears to me plain, not only from the words of the section, but also from a line of decisions to which the Master of the Rolls has referred, and of which *Dallow* v. *Garrold* (1), *Haymes* v. *Cooper* (2), and *Shippey* v. *Grey* (3), are illustrations. The fact that the landlord had given notice of his claim to the receiver afforded no valid reason against making the charging order of April 6.

LOPES, L.J. The charging order of April 6 was made by Cave, J., as a judge of the High Court sitting in bankruptcy, and the first question is, whether it is a subsisting and binding order. It is argued that it is not, because at a subsequent date the matter was reheard by Cave, J., and the order was varied and in part discharged. But I am clearly of opinion that Cave, J., had no jurisdiction to rehear the matter. *In re St. Nazaire Co.* (4) shews that, when once an order of a judge of the High Court has been drawn up and perfected, the judge has no jurisdiction to vary or discharge it. But in the present case Cave, J., was not asked by the notice of motion, or in any other way, to rehear the matter, and he did not in fact rehear it. The order was not varied or discharged, and it remained a subsisting and binding order. All that Cave, J., did was to give some directions to the receiver as to the application of the money in his hands.

If, then, the charging order is a subsisting and binding order, what does it bind? It is clear, both from the authorities and

(1) 14 Q. B. D. 543.
(2) 33 Beav. 431.
(3) 49 L. J. (Q.B.D.) 524.
(4) 12 Ch. D. 88.

the terms of the Act, that it binds all moneys which are under the jurisdiction of the Court in the action at the time when the order is made, and that it does so in priority to every one except a bonâ fide purchaser for value without notice. In no sense of the words can the landlord be said to be such a purchaser. He is not, therefore, entitled to dispute the charge of the solicitor. The appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *T. J. Pullen, for J. J. Wiggins, Poplar.*
Solicitors for respondent: *Jennings & Sons.*

W. L. C.

[IN THE COURT OF APPEAL.]

March 26.

IN RE AN ARBITRATION BETWEEN HOLLIDAY AND OTHERS AND THE MAYOR AND CORPORATION OF WAKEFIELD.

Waterworks—Reservoir—Mines—Compensation for Minerals not workable—Apprehended Injury to Mine—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 22, 25, 27—*Costs incidental to Arbitration—Special Case—Jurisdiction over Costs—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 34.

By the Waterworks Clauses Act, 1847, s. 25, the undertakers of waterworks shall from time to time pay for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the works, or by reason of apprehended injury from the working thereof.

The claimants were lessees of a coal mine, comprising four seams of coal running beneath land which the corporation had, under a special Act incorporating the Waterworks Clauses Act, 1847, acquired in order to make a reservoir there. The claimants were working three of the seams, and preparing to sink a shaft to work the fourth, called the Cannel seam, and they gave notice of their intention to work the seams under and within the prescribed limits of the land of the corporation, who thereupon gave notice to treat for the purchase of a part of one of the lower seams. An arbitrator found, in a special case stated for the opinion of the Court, that the workings of the claimants had not yet approached the reservoir so as to cause any present risk to the mines from it, but that, assuming the corporation to purchase and retain in situ the part of the seam for which they had given notice and no other coal, the claimants, by reason of the waterworks and of apprehension of injury therefrom to the Cannel seam, could not work or get more than 50 per cent. of the Cannel coal under the reservoir or within twenty yards of its boundary, and that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working or getting more than 50 per cent. of the Cannel coal:—

Held, by Fry and Lopes, L.JJ. (Lord Esher, M.R., dissenting), reversing the

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

decision of the Queen's Bench Division, that on these findings the arbitrator was not justified in awarding compensation under the Act for the 50 per cent. of the Cannel coal which could not be obtained.

Held, also, that the costs of a special case stated by the arbitrator were costs incidental to the arbitration within the meaning of s. 34 of the Lands Clauses Consolidation Act, 1845, and were therefore costs over which the Court of Appeal had no jurisdiction.

SPECIAL CASE stated by an arbitrator under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).

The claimants were lessees of four seams of coal known as the Cannel coal (including the black coal), the Doggy coal, the Little coal, and the Middleton coal, lying in the order indicated under lands in the townships of East and West Ardsley.

In 1872 the claimants had sunk a shaft at East Ardsley, and by means of it had worked and still continued to work the Middleton, Little, and Doggy seams under their leases. They had not yet begun to work the Cannel seam.

By the Wakefield Corporation Waterworks Act, 1880, 43 & 44 Vict. c. lvii., s. 13 (3) and (15), the corporation took power to make a reservoir and works at East and West Ardsley and to acquire lands compulsorily for that purpose.

Before June 19, 1883, the corporation had acquired, under the Act and for the purposes of a reservoir and works, certain lands (including part of the land which, with the coal thereunder, was demised by the leases), and they had begun to make their reservoir upon such acquired land.

Prior to November, 1883, the claimants had made preparations to bore with a view to the sinking of a pit at a place called Blue Pits, but they were stopped by the corporation, with whose reservoir such pit would have interfered. The claimants bonâ fide intended to sink a pit there for the purpose of working and getting the Cannel and Doggy seams under the leases. To sink a pit at a spot outside the corporation land would have involved an additional expense to the claimants as compared with the cost of pits sunk at Blue Pits.

On June 19, 1883, the claimants gave written notice to the corporation that they were the lessees under the leases of the four seams of coal lying partly under the proposed reservoir and works and partly under other lands comprised in the leases and

lying within forty yards of the prescribed limits of the works, and they thereby also gave notice that they then intended to work the seams.

On July 19, 1883, the corporation gave to the claimants a counter-notice to the effect that if the reservoir was made and the claimants should by fair and regular working approach within the distance prescribed by the Waterworks Clauses Act, 1847, the corporation would in such case expect the claimants to give the usual notice, and would then be ready to take such steps as could be lawfully required of them.

On November 1, 1883, the corporation gave notice to treat for 35A. 3R. 24P. of the Middleton seam.

The workings of the claimants had not approached the reservoir in such a manner as to cause any present risk to the claimants' mines or seams from the existence of the reservoir assuming it to be filled with water. If the claimants were free to work their mines or seams without risk of interruption from the works of the corporation they could and would have got the whole of the Middleton and Cannel coal under the reservoir and within forty yards of its boundary within the respective terms of their leases. Assuming the corporation to purchase and retain in situ the 35A. 3R. 24P. of the Middleton seam for which they had given notice, and no other coal in that or any other seam, the claimants by reason of the corporation works and of apprehension of injury therefrom to the Cannel seam could not work or get more than fifty per centum of the Cannel and black coal under the reservoir or within twenty yards of its boundary, and the arbitrator found that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working or getting more than 50 per cent. of the Cannel and black coal on their such last-named area.

There was no reason to apprehend injury present or future from the corporation works to any part of the Doggy seam or of the Little seam, or to any part of the Cannel seam if 50 per cent. of the Cannel and black coal in the area aforesaid were retained in situ, or to any part of the Middleton seam.

It was contended on behalf of the corporation that the jurisdiction of the umpire in this reference was limited by the notice to

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &c. OF WAKEFIELD.

treat, and that he could not award compensation for any subject-matter except the value of the claimant's interest in the said 35A. 3R. 24P. of Middleton coal, and the injurious affecting of the claimants' mines by reason of their being compelled to leave such area of 35A. 3R. 24P. unworked.

The claimants contended that the umpire was at liberty to award compensation for any damage which they had sustained or could prove to his satisfaction they would sustain by reason of their mines being injuriously affected by the execution of the corporation works, and further, that they were entitled under ss. 6 and 25 of the Waterworks Clauses Act, 1847, to call upon him to give them the price of any coal which they could satisfy him would have to be left in situ by reason of the apprehended injury from the corporation works.

The questions for the opinion of the Court were :—

1. Whether by virtue of the Waterworks Clauses Acts or of the Lands Clauses Act, or otherwise, the claimants were entitled upon this arbitration to claim and to recover compensation for the prospective prevention of the working of more than fifty per cent. of the Cannel and black coal within the area above mentioned.
2. Whether by virtue of the said Acts or otherwise, the claimants were entitled upon this arbitration to recover compensation for being prevented from sinking a shaft at Blue Pits.

If the Court should answer both questions in the affirmative, the arbitrator awarded that the claimant had sustained damage in respect of their interest in the land and minerals which had been taken for or injuriously affected by the execution of the corporation works to the amount of 13,214*l.*, and were entitled to compensation to that amount. [Sums of less amount were awarded on other alternatives which need not be here set out. The second question was not contested.]

1887. June 13. *Sir R. E. Webster, A.G.* (with him, *George Banks*), for the claimants. On the findings in the case the claimants are entitled to compensation for being prevented from working part of their mine. By the Waterworks Clauses Act,

1847, s. 3, "The word 'lands' shall include messuages, lands, tenements, and hereditaments, or heritages of any tenure." That has been held to include mines. By s. 6 the Lands Clauses Consolidation Act, 1845, is applied to the case of lands taken or injuriously affected. A reservoir has been constructed and valuable land underground has been affected. The right to compensation could not be denied, apart from the mining clauses 18 to 27 inclusive. But they make no difference. By s. 22 if the lessee of mines or minerals lying under the reservoir be desirous of working them, he shall give thirty days notice thereof to the undertakers, who may inspect the mines, and if they be willing to make compensation for such mines to the owner he shall not work them. That means mines and minerals not injuriously affected, i.e., such as can be worked. Then s. 23 has certain provisions, part of which are not in the Railways Clauses Act and are necessitated by the nature of waterworks. If before the expiration of such thirty days the undertakers do not state their willingness to treat with the lessee for the payment of compensation, he may work the mines in the usual manner. By s. 25 the undertakers shall from time to time pay the owner for any mines or minerals not purchased, which cannot be obtained by reason of making and maintaining the works, or by reason of apprehended injury from the working thereof. That is to meet the case where the mine-owner ascertains that the mines cannot be worked safely. The undertakers might run the risk of damage to the reservoir from the mines, but as there would be risk of injury to the mines if they were worked, compensation is given by s. 25 for the injury sustained by the mine-owner. The right to compensation arises at once on the making of the reservoir. The undertakers wish to wait until the workings are within twenty yards before deciding whether they will take the mines or not. The words "from time to time" in s. 25 mean only "whenever and as often as injurious affection arises." But when it is known, the claimant must come forthwith and have the compensation for that injurious affection which is known assessed once and for all. The same words "from time to time" are in the Railways Clauses Consolidation Act, 1845, s. 81, as to payment of compensation for mines. Uncertainty as to the existence of

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

coal, or as to the length of term of the lessee, can only affect the quantum of compensation, and not the right to it. In *Whitehouse* v. *Wolverhampton Ry. Co.* (1) the Court held that an arbitrator assessing compensation under that section rightly included compensation for additional losses and expenses not then actually sustained but which would nevertheless be sustained in working the mines, and were capable of being immediately estimated with reasonable certainty. The principle is stated in the judgment of Cleasby, J.

In *Cromford Canal Co.* v. *Cutts* (2) the Lord Chancellor stated the principle thus: "If the coal owner sustains injury by getting less coal, or by working in a less beneficial manner for the sake of not injuring the canal, he will, in the same manner as if he lie under notice to leave a third of the coal or a pillar, have a right to compensation."

F. M. White, Q.C. (with him, *T. E. West*), for the corporation. The arbitrator has misconstrued the Act, and his inferences are not justified by the facts found. He has assumed that the claimants would—but for the reservoir—have got the whole of the coal under it, and within forty yards during the respective terms of their leases. The opportunity has not arisen. When it arises the corporation might buy the Cannel coal as they have bought the lower seam. The arbitrator has, however, assumed that they will not do so. The undertakers had a right to make and fill the reservoir. A cause of action accrues only where damage is done. But the mines are not yet open, therefore no damage has been done. There is no indication of actual damage in the award. The claimants must rely solely on s. 6, which gives compensation for lands taken or "injuriously affected." Those words, however, only apply to cases where injury from the construction of the works would have been actionable if they had not been authorized by statute.

By s. 27 of the general Act, and s. 37 of the special Act, all rights of action are preserved. If it were not for those sections the right of action would be taken away. At common law if the mine-owner worked his mines properly, and water from a reservoir above came into them, he could maintain an action: *Rylands* v.

(1) Law Rep. 5 Ex. 6. (2) 5 Rail. and Canal Cases, 442.

Fletcher. (1) By s. 18 the undertakers shall not be entitled to any mines unless expressly purchased. The owner may therefore work them out. Sect. 22, enabling the undertakers to inspect the mines, assumes that the mines are opened. The mine-owner clearly cannot claim compensation under that section for mere apprehended damage. When he is within thirty days of working the mine, and it is going to be worked, he can then avail himself of s. 22. If he is, in fact, damaged by the reservoir he has his right of action, which is reserved by s. 27. Sects. 23 and 24 evidently relate to s. 22. The claimant relies on s. 25, but the words "from time to time" in it cannot be ignored. The time in this case has not arrived. The mines are unopened, the shaft not sunk, and the works had not approached within forty yards when the arbitration was held in May, 1885.

The undertakers, by s. 25, shall from time to time pay to the owner or occupier of any mines extending so as to lie on both sides of any reservoir all such additional expenses and losses as shall be incurred by reason of the severance of the lands over such mines by the reservoir or of the continuous working of such mines "being interrupted as aforesaid"—that refers to s. 24, and s. 22, and is solely to provide for cases of mine-owners who by reason of the previous sections have a right of working the coal on either side uninterruptedly—"and for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works, or by reason of such apprehended injury from the working thereof as aforesaid;" that refers to ss. 24 and 22, and means injury apprehended to the reservoir by the undertakers, not injury apprehended by the mine-owner to the mines. "Not purchased by the undertakers" implies that the time has come for them to exercise their option of purchase and that they have not bought. No case for compensation can be established against the undertakers until the time has arrived when they can buy. Then they will have a right to buy the minerals required subject to rights of ventilation and way. The arbitrator awards that the undertakers shall pay money now because the mine-owner may hereafter leave coal there. But the award does not bind him to leave any. He might

(1) Law Rep. 3 H. L. 330.

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

work out all his minerals irrespective of the reservoir: *Great Western Ry. Co.* v. *Bennett* (1); *Pountney* v. *Clayton* (2); and the undertakers could not complain.

Sir R. E. Webster, A.G., was not called on to reply.

MATHEW, J. I am of opinion that the claimants are entitled to the larger sum mentioned in the special case, in other words, that they are entitled to the benefit of the award made by the arbitrator in respect of the Middleton seam and also in respect of the prospective injury to the mine-owner from the difficulty in working the Cannel seam. The arbitrator came to the conclusion that the Cannel seam would be interfered with to the extent of 50 per cent., and made his award on that footing. It has been argued that the time had not come for assessing compensation in respect of injurious affection of the Cannel seam. The argument has perhaps gone further than was necessary. The two sections under which the right to award compensation for injurious affection is given are s. 6 and s. 25 of the Waterworks Clauses Act, 1847. The former section provides for compensation under the Lands Clauses Act in respect of lands taken or injuriously affected, and s. 25 enacts that the undertakers shall from time to time pay to the owner, lessee, or occupier of any mines all additional expenses and losses incurred by reason of severance, or interruption of continuous working of the mines or minerals, or by reason of the same being worked under the restrictions in this or the special Act; "and for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works, or by reason of such apprehended injury from the working thereof as aforesaid;" and if any dispute or question shall arise between the undertakers and such owner, lessee, or occupier touching the price of such minerals, the same shall be settled by arbitration under the Lands Clauses Act. The words "for any mines or minerals not purchased . . . which cannot be obtained by reason of making and maintaining the said works," are the words which appear to me material. In this particular case the arbitrator has found that the Cannel seam to the extent of 50 per cent. cannot be won by

(1) Law Rep. 2 H. L. 27. (2) 11 Q. B. D. 820.

reason of the water in the reservoir. The learned counsel for the corporation pointed out the impossibility of the arbitrator coming to that conclusion, and said that it was ultra vires, and that he could not do anything but speculate on the matter. But it was discussed before the arbitrator as if he could dispose of it, and he did dispose of it, and came to that conclusion. We pressed the learned counsel to point out the time at which the assessment should take place. He said that at any rate it should be postponed until the mine workings were within forty yards of the waterworks or pipes. The objection in point of fact was made to the finding of the arbitrator, and not to his jurisdiction. I think the arbitrator was entitled to deal with the matter as he did. The learned counsel, in aid of his contention, referred to earlier clauses in the Waterworks Act. They apply to works likely to injure the undertaking of the waterworks. He referred to s. 22, enacting that if the owner of any mines lying under the waterworks, or under pipes or works which shall be under ground and described in a deposited plan, or within the prescribed distance—and, if no distance be prescribed, within forty yards therefrom—be desirous of working the same, such owner shall give notice thirty days before working, and it shall be lawful for the undertakers to cause such mines to be inspected, "and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same; and if the undertakers and such owner do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation." I cannot assent to the argument that we must gather from that section the intention of the legislature that no compensation shall be made to the mine-owner until his works are within forty yards of the waterworks. If this were meant we should not have been left in doubt on the subject. Then it was said that the provisions in s. 25 should be examined in two lights, first, on the assumption that they apply to this case, and if they do, the words "from time to time" must not be lost sight of, and it is said that those words shew that the claim for compensation can only be entertained when the works reach

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

Mathew, J.

the point of danger. But I think that the provision "from time to time" means "as occasion arises," i.e., whenever a fresh cause for compensation presents itself. Then, says the learned counsel, the section does not apply at all, for it only applies where there is a severance. I cannot adopt that view. The consequence of holding s. 25 not to apply would be that recourse must be had to s. 27, and, if a mine should be drowned, the mine-owner would have the satisfaction of a cause of action and no other remedy. I should hesitate long before I came to the conclusion that that was the meaning. Here are promoters of an undertaking petitioning Parliament for leave to make a reservoir in certain land. They could not do so there without the assistance of the legislature. Parliament protects the coal-owners, and gives the promoters powers on condition of their paying compensation for injurious affection as well as for land taken. It would be an anomaly to take away the rights of the landowner and hold out to him only the prospect of a right to sue what might perhaps be an insolvent undertaking. There is no indication of any such kind of legislation. Sect. 27 is added to give the utmost protection to the landowner. It is an omnibus section to comprise every possible right. Moreover, we are not without guidance in the matter, for in *Whitehouse* v. *Wolverhampton Ry. Co.* (1), although no principle as to the construction of these sections is clearly stated, the Court said that in that case the claims of the landowner were properly dealt with, and that it was no objection that the damage was prospective when that damage might be ascertained with reasonable certainty. Compensation was given on the ground of additional expenses. It was objected that it was all prospective, but the Court said that was for the arbitrator. So, here, it has been ascertained, and, as it appears to me, with reasonable certainty, that the effect of opening the reservoir without leaving 50 per cent. of the "cannel" seam would be to drown the mine, and I am of opinion that our judgment should be in favour of the claimants for the larger sum.

CAVE, J. I am of the same opinion. The questions we have to answer are, first, whether, by virtue of the Waterworks Clauses

(1) Law Rep. 5 Ex. 6.

Act and the Lands Clauses Act or otherwise, the claimants are entitled to compensation in respect of a quantity of the Cannel seam which they are prevented from working; and, secondly, whether the claimants are entitled to compensation for being prevented from sinking a shaft at Blue Pits. The Attorney General contended that they are so entitled under s. 6 and s. 25 of the Act, and particularly under s. 25. The learned counsel for the corporation argued that the claimants are not entitled to compensation under either of those sections, not under s. 6 because the making of the reservoir gave no cause of action, and if damage has arisen from the maintenance of the reservoir, although that would give a cause of action, yet that right of action is not taken away, and consequently no compensation can be claimed under this section which gives a right to compensation only where the right of action is taken away. Sect. 6, which is in general terms, does not seem to me to apply to mines at all, and I think that minerals are intended to be dealt with in ss. 18 to 27, and that unless a mineral owner can find compensation under these sections he has it not at all. The scheme is that the makers of the reservoir shall not in the first instance acquire a title to the minerals, and therefore pari passu shall not pay compensation to the mine-owner for them. But that state of things cannot continue without some modification, because there are two rights to be reconciled, viz., one, the right of the mine-owner to get the minerals reserved to him for which he has not been paid; the other, the right of the undertakers to have the necessary support for their reservoir in order that the water may not be let out. Sects. 19 to 24 inclusive are intended to provide for these conflicting rights. The theory of these sections seems to me this: that when the mine-owner comes within a certain distance of the undertaking he must give the undertakers notice that he is going to work under their reservoir, and then they have power to inspect and determine whether they will or will not purchase the minerals as support. Assuming that they determine to purchase, then compensation is assessed and there is an end of it. It may be that they determine not to purchase, and then there is reserved to the mine-owner the right to work his mine in the usual manner but he is not to damage the works of the undertakers

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

Cave, J.

by working in an unusual manner. The legislature might have stopped there and have left the mine-owner and the undertakers to their respective rights under ss. 22 and 23. But the legislature has not done so; for s. 25 is framed apparently in the interest of the mine-owner. It seems to have occurred to the legislature that s. 22 and s. 23 were insufficient for his protection, and that he required something more. In the first instance there was probable loss by severance of the surface lands; he might be put to inconvenience and considerable loss by a portion of the surface over his mine being severed from other parts so as to interfere with his rights of way. So s. 25 does what was not done before, viz., gives him compensation for loss by severance of that kind. Then, if the undertakers choose to buy a strip of minerals to support their reservoir under s. 22, another difficulty may arise, loss may result from interruption of the continuous working of the mine. Obviously the mine-owner will be able to work at less expense if he can work continuously instead of having a block of minerals left in his way which the undertakers have purchased, and which consequently he cannot work. Sect. 22 does not provide for that, so s. 25 takes it up and gives compensation. Thirdly, the mineral owner may be required to work under certain restrictions placed upon him. Thus, for example, in the present case it would be more convenient to work by a shaft at Blue Pits. But the undertakers have taken the surface land of the Blue Pits, and the mine-owner cannot sink his shaft there and has to sink it at a different place, at an additional expense of 150*l.*; and I think that is within s. 25 an additional expense and loss by reason of the mines being worked under restrictions contained in the special Act, because the special Act has authorized the undertakers compulsorily to take the surface and so prevent him from working in the mode most convenient to him. I fail to see that compensation could have been obtained under s. 22 for that loss. We next come to something put in a different category. Up to this point—at all events as to the first two heads of loss—it is essential that the mine-owner should have minerals on both sides the reservoir, for otherwise there is no severing or interrupting of continuous working by the reservoir. But when we come to the other two heads it seems to me not

essential that he should have land on both sides of the reservoir in order to incur the loss which will be suffered unless he gets compensation. Consequently the section goes on to say, "the undertakers shall pay for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works." That clause as it stands is in the Railways Clauses Act, and it might be a question if the clause stopped there, whether the mine-owner is entitled to compensation in the particular case, for it might be said that he is not prevented by reason of the making and maintaining of the works, for he might proceed to work his mines, and if the reservoir was let down into them he would have a right of action for that by s. 27. But the words are added: "or by reason of such apprehended injury from the working thereof as aforesaid." That seems to me to apply to the case where it is physically possible to work the mines—which therefore do not come within the first part—but where "by reason of apprehended injury from the working" the minerals practically cannot be obtained. If the mine-owner approached within forty yards the undertakers might say, "We elect not to give you compensation and not to purchase the minerals; we are aware that if we do not purchase you are at liberty to work, and we are liable for any damage, and shall have to pay compensation; but we are so well aware of the loss that it will occasion to you, and that even a series of actions will be no real compensation, that we are sure you will not work them, and so we shall get the support of your mines without having to pay for them at all." To meet this, s. 25 provides that the undertakers shall pay for mines and minerals which cannot be obtained "by reason of such apprehended injury." It was argued that these words meant injury to the reservoir, and that is undoubtedly so, for the legislature has been looking at the subject from that point of view. But here it clearly is apprehended injury to the reservoir which interferes with the working of the mines—injury to the reservoir, in the first place, from letting the water out of the reservoir causing such injury to the mines as to interfere with their being worked. It is found in the case that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

Cave, J.

injury to abstain from getting more than 50 per cent. of the cannel coal. I come to the conclusion that these words of s. 25 do apply to such a case as this, and do give compensation to the mine-owner.

Then arises a subsidiary question which, I will take it, was raised before the arbitrator, viz., when is this compensation to be made? It is obviously only a subsidiary question, for the main question argued before us here was, that there was no right to compensation at all under s. 25. The Act says "from time to time." It was argued that the time does not arrive at all until the mine-owner can give the requisite notice, and put s. 22 in force. It is said,—first that the only remedy is to work the mine and bring an action; but if that is not so, then it is said that the remedy does not arise until the mine-owner has got to within forty yards, and has tried to put s. 22 into effect, and has failed to induce the undertakers to give him compensation. But it appears to me that, if that were so, in many cases the time for compensation would never arise. Here we are dealing with a small reservoir of three or four acres, but many reservoirs are much larger, and suppose there were a very large tract of minerals taken which was required to be kept for the protection of the reservoir, and yet so much left as would enable the mine-owner to sink a shaft and get down to that, but it would be quite unprofitable to sink the shaft, what then must he do? According to the argument for the corporation he must sink this utterly useless and unprofitable shaft near the land taken by the reservoir, and when he is down to the seam and within forty yards of the minerals under the reservoir, s. 22 will come into operation, and he will get paid for them. But what is to happen as to all this absolutely useless expenditure? Why should it be necessary that he should go down this distance to shew that he cannot get any further? I find nothing in s. 25 which points to expenditure of this kind. It would have been extremely easy if that was the intention of the legislature, to say that if the undertakers refuse to purchase under s. 22—or some words of that kind making the compensation depend on their refusal to act under s. 22—that then, and then only, the right to compensation should arise. I find nothing of that kind, but only that they shall make it "from time to

time." Looking at the general scope of the Act—that the expense of purchasing the minerals is not to be thrown on the undertakers until absolutely necessary, and that compensation is not to go into the pockets of the mine-owner until likely to get there in the ordinary way of winning the minerals—the conclusion I come to is that the provision "from time to time" means that the loss or injury need not necessarily have happened, but that it must be reasonably imminent. I do not think we can put any construction upon the words more definite than that. In *Whitehouse* v. *Wolverhampton Ry. Co.* (1) it was contended that inasmuch as the undertakers were to pay for additional expenses and losses "incurred" they must be incurred before the undertakers could be called upon to pay for them. The Court, however, without laying down any general principle, came to the conclusion that the effect of the section was not to drive the mine-owner to incur the expenses and losses before he could get compensation, but that when the happening of the loss and incurring of expense were reasonably imminent he might come and claim compensation. I think we may safely follow the course taken by the Court of Exchequer in that case, and while refusing to lay down any more definite proposition than that the expenses must be reasonably imminent, we may say, that in this case, at all events, we think the loss and expense were reasonably imminent and that under all the circumstances the time for assessing this particular compensation had come. The arbitrator has fixed, and apparently without the least difficulty, what is the proper amount of compensation, and under all the circumstances of this case I think it is a fair and reasonable conclusion to say that that compensation had become payable under s. 25, because the injury was so reasonably imminent as to entitle the mine-owner to have the compensation assessed. Therefore I am of opinion that our judgment should be for the claimants for the larger amount.

Judgment for the claimants.

J. R.

The corporation appealed.

(1) Law Rep. 5 Ex. 6.

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

1888. Feb. 18. *Sir H. James, Q.C.*, and *F. M. White, Q.C.* (with them, *T. E. West*), in support of the appeal.

Sir R. E. Webster, A.G., and *George Banks*, for the claimants.

Cur. adv. vult.

1888. March 26. LORD ESHER, M.R. Our decision in this case must turn on the view we take of the meaning of the special case and the application of the statute to it. I take the meaning to be that at the time the action was brought the mine-owner was of opinion that he could not work the mine either with safety to the waterworks or the mine, and that that opinion was one which a reasonable man in his position would have come to. No prudent lessee working without right to compensation would have fully worked the seams of coal, and it was possible at that time to find to what extent he would be prevented from working the coal, and easy to ascertain the damage that would arise by reason of his abstaining to work it. The arbitrator has in fact found all these facts, and therefore it is plain that an injury palpable and capable of being estimated was existing. Can the statute be made applicable to such a state of facts existing at the commencement of the arbitration?

It is said, first, that the case is brought within the 6th section, because the word "lands" is applicable to mines, but that section is not applicable to the present case. The question, therefore, must be determined on consideration of the sections from 18 onwards, which are introduced with the words "with respect to mines be it enacted as follows." By s. 22 mines or minerals lying under the works, or within the prescribed distance, or if no distance be prescribed within forty yards, are not to be worked until the owners give notice to the undertakers of their intention to work them. This clearly applies to the case where the mine-owner is desirous of working the mine, and has made up his mind that he will commence the work of which he is going to give notice. The section is in favour of the undertakers in requiring that notice, and giving them an opportunity of stopping the working on payment of compensation. It does not apply to mines which the owner does not intend to work, nor does s. 23, which does not come into play unless s. 22 is applicable to the

case. Sect. 25 deals with cases not dealt with so far, and is entirely in favour of the mine-owners. The promoters have come into proximity with the owner not by agreement, but by authority of an Act of Parliament, and are to pay the additional expenses and losses incurred by the owner, lessee, or occupier, by reason of the severance of the lands, or of the interruption of the continuous working of the mines or minerals, or by reason of the same being worked under restrictions, and for mines and minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the works, or by reason of the apprehended injury by the working thereof. In my opinion the words "extending so as to lie on both sides of any reservoirs, buildings, pipes, conduits, or other works," do not according to correct grammatical construction apply to the mines and minerals not purchased by the undertakers, which cannot be obtained by reason of the making of the works, or by reason of the apprehended injury, and according to right and justice they ought not to be held to apply. This case comes within the exact words of the section, for the mine-owner cannot obtain a part of the minerals by reason of the injury which, as found by the arbitrator, a careful man would rightly apprehend from the working of them. Under these circumstances it would work a great injustice to the mine-owner if he cannot be compensated at once, but is forced to go on till the injury is done. It was suggested that he was to go on with his works until he came within forty yards from the works. That, however, is to tack on s. 25 to s. 22, and to prevent it coming into play unless in some case where s. 22 applies. In my opinion they are perfectly distinct, and the mine-owner in asserting his rights under s. 25 is not to be prejudiced by what has been previously enacted in s. 22 in favour of the undertakers.

I think the judgments in the Court below are right, and I should be content to rest my judgment on the reasoning stated in them.

FRY, L.J. The question is whether by virtue of the Waterworks Clauses Act or the Lands Clauses Acts, or otherwise, the claimants were entitled under this arbitration to recover compen-

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &c. OF WAKEFIELD.

Fry, L.J.

sation for the prospective prevention of the working of more than 50 per cent. of their cannel and black coal. The right of the claimants to recover compensation for this 50 per cent. is put on two grounds: first, that the mine is injuriously affected within the meaning of s. 6 of the Waterworks Clauses Act, 1847. As to this I take it to be plain law that nothing amounts to an injurious affecting which entitles to compensation unless, but for the statute, the matter would have been the subject of an action at law: *Caledonian Ry. Co.* v. *Walker's Trustees.* (1) Here the corporation purchased the surface land and the owners remained in possession of the mines and minerals. The owners of one of these two tenements, namely, the surface land, might use it as they chose without being liable to any action provided they did not do any injury to the actual enjoyment of the subjacent land. The claim, therefore, of the mine-owner under s. 6 fails, but the case is put on the ground of a right arising under s. 25 of the same Act, and to that our attention has been principally directed. There is a group of sections, commencing with the 18th, respecting mines. Under s. 18 the undertakers are not required to purchase mines or minerals under or near their works, but the statute leaves undertakers and mine-owners in the position of adjoining owners, and except so far as the rights of either are interfered with by subsequent sections those rights continue to be those of adjoining owners. Does the Act give a right of compensation to the owner of subjacent land who apprehends that an injury will arise should he work the minerals in such land? I pass over s. 19 and the two following sections, and come to s. 22. Under that a notice from the mine-owner that he is going to work under or within the prescribed distance of the works puts the undertakers to an election whether they will purchase the minerals or not. If they decline to purchase then the owner may work the minerals as provided by s. 23, provided no wilful damage is done and the mines are worked in the usual manner.

Sect. 24 assumes the purchase by the company of a portion of the subjacent mine arising out of the apprehended injury to the works—that is the injury referred to in s. 22, as apprehended by the undertakers as likely to arise to the works from the working

(1) 7 App. Cas. 259.

of the minerals. The only persons who can apprehend an injury up to this point are clearly the undertakers. Then follows s. 25, which it should be noted is one sentence. There is one set of persons who are to pay, namely, the undertakers, and one payee, the owner, lessee, or occupier of mines extending so as to lie upon both sides of any reservoir, buildings, pipes, conduits, or other works. There are five matters in respect of which payments are to be made; first, the severance of lands over the mines, that is of surface lands; secondly, the interruption of the continuous working of the mine, that is the interruption which arises from the taking of a portion of the minerals, which but for that the owner would have worked; thirdly, the restrictions on working, such as those in s. 23 on working in anything but the usual manner; fourthly, and here there is no new sentence, the value of mines or minerals not purchased by the undertakers but which cannot be got by reason of the works; and, fifthly, the apprehended injury from the working as aforesaid, that is the injury referred to in ss. 22 and 24 as apprehended by the undertakers. It seems to me to follow that an injury which a mine-owner apprehends and which the undertakers do not is nowhere provided for. The reason for the omission seems to me to be that unless the undertakers purchase the mineral the taking away of which would be injurious the mine-owner is at liberty to work it.

The award itself appears to me to bring out clearly the difficulty of paying for a prospective danger to the mines apprehended by the mine-owner. The payment in question is directed on an assumption of a future state of things the truth or falsehood of which cannot possibly be known when the payment is made—the assumption being that the corporation will not purchase the Cannel, the Doggy or the Little coal. But suppose the sum in dispute is paid; that Messrs. Holliday subsequently desire to work the Doggy coal under the reservoir, and give their notice under s. 22 of the Act, and the corporation elect to pay for this coal, and do pay for it; and suppose again that the same thing happens with the Little coal: then according to the finding of the arbitrator Messrs. Holliday will, without danger, be able to work the whole Cannel coal for one half of which they have been already paid.

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

I regret to find myself in disagreement with the Master of the Rolls, but in my opinion the claimants are not entitled to succeed in the arbitration, and the appeal should be allowed.

LOPES, L.J. There are three sections of the Waterworks Clauses Act, 1847, which it is material to consider and to construe. These are the 6th, the 22nd, and 25th sections.

The 6th may be shortly disposed of. The shaft sunk at the Blue Posts has been compensated for. In no other respect is the mine-owner entitled to compensation under this section, which only applies where there is injurious affection by the construction of the works, and a right of action is taken away by the statute. Except in respect of the shaft just mentioned no right of action is taken away from the mine-owner.

Sects. 18 to 27 inclusive apply to mines. The mines and minerals are not to pass to the undertakers unless expressly mentioned. The mines and minerals unless expressly mentioned are to remain the property of the mine-owner. The undertakers are to be entitled to the support of the minerals until that which is contemplated by s. 22 arises.

Sect. 22 provides that if the mine-owner is desirous of working any mines or minerals under the works of the undertakers or within the distance in the special Act, or if no prescribed distance, within forty yards, he is to give the undertakers notice in writing of his intention thirty days before he commences to work; whereupon the undertakers may inspect, and if willing to make compensation the mines are not to be worked and compensation is to be agreed or settled.

Sect. 13 provides for the case where the undertakers are not willing to treat for compensation, and enables the mine-owner to work the mines as therein provided.

Sect. 24 assumes a purchase by the undertakers and is in favour of the mine-owner. It enables him to make certain specified mining communications necessary for the ventilating, draining, and working the mines and minerals in each or either side of the works of the undertakers subject to the provision in respect to the dimensions of such mining communications. The different sections as yet have not dealt with cases of severance. The legis-

lature now proceeds to deal with cases where the mines and minerals are on both sides of the undertaking, cases where a most serious injury and inconvenience would arise to the mine-owner by the interposition of the undertaking, unless he was to be entitled to compensation. Sect. 25 provides for such cases. The governing words of that section throughout are "extending so as to lie on both sides." The subject-matter of that section is "mines and minerals lying on both sides of the undertaking." That the earlier part of that section applies to cases of severance, whether of surface or minerals, there can be no doubt. It is said, however, that the words, "for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the said works or by reason of such apprehended injury from the working thereof as aforesaid," have a much more extended meaning, and cover the present case. I think those words still contemplate a severance, and apply to the case of some isolated mines and minerals so cut off and severed by the interposition of the undertaking that they are not workable at all, or not remuneratively workable, or which are so circumstanced owing to the position of the undertaking that it would be dangerous to the undertaking to work them. If these words were held to apply where the workings were not within forty yards, s. 22 would be superseded and become in many cases useless.

I think it was the intention of the legislature that until the workings approached within forty yards of the undertaking, and notice given, the mine-owner should have no right to compensation of any kind. The working had not approached within forty yards of the reservoir in the present case, and I am of opinion the question asked in the special case should be answered in the negative, and the decision of the Court below be reversed.

March 27. On an application on behalf of the corporation for an order as to costs,

Sir R. E. Webster, A.G., contended that the costs of the special case were costs of and incident to the arbitration, and as such to be borne by the promoters under s. 34 of the Lands Clauses

1888

IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C. OF WAKEFIELD.

Consolidation Act, 1845. (1) In *Bidder* v. *North Staffordshire Ry. Co.* (2) the Court of Appeal declined to make any order as to costs, and *In re Mill's Estate* (3) shews that the Judicature Acts and rules do not enable the Court or a judge to order costs to be paid by persons who before the Acts came into operation could not have been ordered to pay them.

Sir Henry James, Q.C., for the corporation. The proposition on the other side is that a claimant is never to pay for making a wrong claim. When the Lands Clauses Consolidation Act, 1845, was passed there was no appeal from the arbitrator, and the costs which were taxed by the arbitrator were those of the matters before him over which he might well have control. In 1869 that taxation of costs was transferred to the taxing master. This proceeding is no more incidental to the arbitration than a case stated in an action on the award. Incidental does not mean following on or proceeding out of but is confined to matters as to which the arbitrator can exercise some control and discretion.

FRY, L.J. The question before us is whether the costs of this appeal are or are not costs of or incidental to the arbitration. It has been argued that they are not, because at the time the Lands Clauses Consolidation Act, 1845, was passed, there was no power to incur any such costs, because no power of appeal existed. I think, however, that this is not the true view, but that the costs incidental to such an arbitration are the costs of whatever matters are done incidental to the arbitration according to the powers which the legislature from time to time may vest in the arbitrator. If subsequently to the Act of 1845 the legislature gives power to an arbitrator to state a special case, and subsequently to that allows an appeal from the decision on the special case, then the scope of the words "of and incidental to" is properly enlarged. The arbitrator has stated certain facts in the

(1) 8 Vict. c. 18, s. 34: "All the costs of such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

(2) 4 Q. B. D. 412.

(3) 34 Ch. D. 34.

special case and given alternative awards. His findings are obviously not conclusive or capable of being enforced until the questions that are raised are determined. This is a powerful argument to shew that the whole matter is incidental to the arbitration, and I am of opinion that we have no power to make any order as to costs.

LOPES, L.J. I also am of opinion that this application is not within our general jurisdiction as to costs. Before the Judicature Acts we should have had no power to make an order as to these costs, and no power is conferred on this Court in such a case by those Acts. When the Lands Clauses Consolidation Act was passed in 1845 there was no power to state a case, but fresh powers were conferred on arbitrators by the Common Law Procedure Act, 1854, and I agree that the consideration of what is incidental to an arbitration must be determined with reference to those fresh powers. I think it is clear that the proceedings on the special case are incidental to the arbitration, because the award of the arbitrator in the alternative is neither definite nor conclusive until the questions he has raised are answered.

FRY, L.J. The order of the Court will be that the appeal be allowed, but that the Court, being of opinion that the costs of the special case are incidental to the arbitration, makes no order as to costs.

Appeal allowed; no order as to costs.

Solicitors for claimants: *Williamson, Hill, & Co. for T. Greenwood Teale, Leeds.*

Solicitors for corporation: *Torr, Janeways, Gribble, & Oddie, for Stewart & Sons, Wakefield.*

A. M.

1888

April 11.

DAVYS *v.* RICHARDSON.

Practice—Payment into Court—Defence setting up Tender—Denial of Liability—Continuance of Action—Payment out of Court—Necessity for Order—Rules of Supreme Court, 1883, *Order* XXII., *rr.* 5, 6.

In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant pleaded that the plaintiff was only entitled to one month's notice, or in the alternative three months; that before action the defendant made tender of three months' salary, which the plaintiff refused; that the defendant had paid the said sum into court, and that it was enough to satisfy the plaintiff's claim.

The plaintiff, without obtaining an order, took the money out of court, and proceeded with the action; at the trial judgment was given for the defendant on the ground that the plaintiff was only entitled to one month's salary.

The defendant applied for an order for payment to the defendant of a part of the money which had been paid out of court:—

Held, that, the action being for unliquidated damages, the payment into Court was not made with a defence setting up a tender of the sum paid, within the meaning of Order XXII., r. 5 (*c*), and, further, that as the defendant's liability was denied, and the plaintiff did not accept the sum paid into court in satisfaction, but proceeded with the action, the case was within rule 6 (*c*), and not rule 5 of Order XXII., and therefore the money ought not to have been paid out of court except in pursuance of an order, and the defendant was entitled to an order for payment.

ACTION for balance due on an account stated and for damages for wrongful dismissal.

The statement of claim alleged that it was agreed that the plaintiff should become manager to the defendant at a salary of 250*l.* a year, and contained the following statements:—

6. "On the 21st March last (1887) the defendant wrongfully dismissed the plaintiff and refused and still refuses to carry out the said agreement or to permit the plaintiff to perform his part thereof.

7. "The plaintiff has always been and still is able and willing to perform and desirous of performing the said agreement."

The plaintiff claimed 250*l.* salary up to December, 1887.

The defence contained the following paragraphs:—

4. "The defendant says, as to paragraphs 6 and 7 of the said statement, that by the agreement in paragraph 1 above mentioned the plaintiff (whose first year of service had terminated in December, 1886) was only entitled to one month's notice at the time when he received the same.

6. "Alternatively the plaintiff under the said agreement was not entitled at the date of the alleged wrongful dismissal to more than three months' notice or salary in lieu thereof for a like period at 250*l.* a year.

7. "Further, as to the whole statement of claim (save paragraphs 1 and 2 thereof) the defendant made tender before action of 163*l.* (according to the particulars below) which the plaintiff refused, and the defendant has paid the said amount of 163*l.* into court and says it is enough to satisfy the plaintiff's claim.

"Particulars.

* * * * *

"Three months' salary in lieu of notice from March 21st, 1887, 62*l.* 10*s.*"

The request for lodgment in court contained a statement that the money was "paid in with defence setting up tender." (1)

At the trial, without a jury, Day, J., decided that the plaintiff was only entitled to one month's salary in lieu of notice, and gave judgment for the defendant.

On applying for payment out of court of the difference between one month's salary and the sum paid into court in respect of three months' salary, the defendant ascertained that before the trial the whole amount had been paid out of court to the plaintiff's solicitor on the plaintiff's written authority. Two summonses were taken out calling upon the plaintiff and the plaintiff's solicitor respectively to pay over to the defendant the difference between one month's salary and the total amount paid into court in respect of salary.

Pollock, B., at Chambers, refused to make an order on either summons, and the defendant appealed.

R. Henn Collins, Q.C. (*Morton Smith*, with him), for the defendant. The decision at chambers was given on the supposition that the case came within Order XXII. rule 5 (*c*). (2) This view

(1) Supreme Court Funds Rules, 1886, r. 32, and Appendix, Form 11.

(2) By Order XXII. rule 5: "In the following cases of payment into court under this order, viz.:—

* * * *

"(*c*.) When payment into court is made with a defence setting up a tender of the sum paid: the money paid into court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the Court or a judge shall otherwise order."

1888

DAVYS v. RICHARDSON.

is incorrect, for the defence denies liability for salary in lieu of notice beyond one month, or in the alternative three months, and therefore rule 6 (1) and not rule 5, is applicable. The money ought not to have been paid out of court without an order, and at the time when it was paid out no order could have been made, for the question of liability then remained undetermined: *Maple* v. *Earl of Shrewsbury and Talbot.* (2)

The defendant therefore is entitled as against the plaintiff to the money now claimed, and the plaintiff's solicitor, having received money to which he had no right, is liable as an officer of the Court to have an order made against him for repayment.

Lumley Smith, Q.C. (*Horace Browne,* with him), for the plaintiff's solicitor, and *Horace Browne,* for the plaintiff. The case comes within rule 5 not rule 6, which distinguishes it from *Maple* v. *Earl of Shrewsbury and Talbot.* (2) This is clear from the plaintiff's own act in paying the money into court "with defence setting up tender."

[MATHEW, J. There is no defence of tender here in the true sense of the words. The old plea of tender could not be pleaded to a claim for unliquidated damages.]

The money was rightly paid out of court in accordance with Order XXII. r. 5, and rule 44 of the Supreme Court Funds Rules,

(1) Order XXII. rule 6: "When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply:—

* * * *

"(*c.*) If the plaintiff does not accept in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in court and be subject to the order of the court or a judge, and shall not be paid out of court except in pursuance of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him."

(2) 19 Q. B. D. 463.

1886. In any case no order ought to be made against the solicitor, who had his client's written authority to receive the money.

Morton Smith, was not called on to reply.

1888

DAVYS v. RICHARDSON.

LORD COLERIDGE, C.J. I am of opinion that the orders must be rescinded, and an order made that the solicitor for the plaintiff shall pay over to the defendant the money claimed. A sum of money has been paid into court by the defendant, which is largely in excess of the amount which it turns out could properly be demanded by the plaintiff. It is true that the plaintiff could have taken the money out of court in satisfaction of the cause of action, but he did not do so, but went on with the action, and was defeated. He had already taken out the money which had been paid into court, and the defendant now applies for repayment of so much of that money as it appears from the judgment at the trial that the plaintiff was not entitled to recover. The plaintiff contends that the defendant is not entitled to such repayment on the ground that by Order XXII., r. 5, the plaintiff was entitled to payment out of court of the whole amount.

In my opinion the answer to the plaintiff's contention is two-fold.

In the first place I think that the words "a defence setting up a tender of the sum paid," in Order XXII. r. 5 (*c*), mean the old and well understood plea of tender, and that the money must be paid under such circumstances as would have justified the old plea of tender. Here the circumstances are inconsistent with a good plea of tender, and therefore, on the construction of Order XXII., r. 5, I am of opinion that even if that rule is considered as if it stood alone, the present case is not within its provisions.

But, further, there is another conclusive objection to the plaintiff's view, which is that rule 5 of Order XXII. does not stand alone, but must be read with rule 6, which is applicable "when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence."

Here the plaintiff claims a year's salary; the defence denies that the plaintiff is entitled to more than one month's salary,

1888

DAVYS v. RICHARDSON.

Lord Coleridge, C.J.

and alleges in the alternative that he is entitled only to three months'; therefore the preamble to rule 6 exactly fits the case. But sub-section (*c*) of the same rule fits the case still more, for that clause applies, "if the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof." This is exactly what the plaintiff has done here, and it follows from the next words in the rule that the money ought not to have been paid out of court without an order.

The money has got into the hands of the plaintiff's solicitor. I do not suggest that he has done anything dishonourable, for it seems that he has made a mistake, into which he was probably led by the use by the defendant's solicitor of the form containing the word "tender;" but he is not entitled to retain the money, and must replace it.

With regard to costs, as it appears that the plaintiff's solicitor was misled by the use of the form to which I have referred, I think there ought to be no order as to costs.

MATHEW, J. I am of the same opinion, for the same reasons.

Appeals allowed.

Solicitor for plaintiff: *John George Clabburn.*
Solicitors for defendant: *Ross & Douglas Norman.*

P. B. H.

THOMAS *v.* PEEK.

1888
April 12, 13.

County Court—Execution—High Bailiff's Fees—Possession Money—County Courts Act, 1856 (19 & 20 *Vict. c.* 108), *ss.* 78, 79, 83, *Schedule* (*C*)—*County Court Rules*, 1886, *Order* XXVII., *r.* 1.

Where a claim is made to goods taken in execution by the high bailiff of a county court, and the execution creditor sends notice, under Order XXVII., r. 1, of the County Court Rules, 1886, of his admission of the claim to the high bailiff, who withdraws from possession, the judge of the county court has power to award possession money up to the time of the receipt of such notice to the high bailiff, and the high bailiff can recover such possession money from the execution creditor by action in the county court, if the judge in the exercise of his discretion is of opinion that the circumstances of the case are such that possession money ought to be awarded.

APPEAL from the County Court of Glamorganshire at Swansea.

The plaintiff was the high bailiff of the county court. The defendant recovered a judgment, and issued execution, under which the plaintiff seized goods, which were in the possession of the execution debtor. A third party claimed the goods under a hiring agreement, and the plaintiff sent notice of such claim to the defendant under Order XXVII. r. 1, of the County Court Rules, 1886. The defendant admitted the claim made to the goods, and sent notice of his admission to the plaintiff, who thereupon withdrew from possession.

The plaintiff sued the defendant in the county court to recover 14*s.*, being four days' possession money, at 3*s.* 6*d.* a day, incurred prior to the receipt by the plaintiff of notice of the defendant's admission of the claim. The judge of the county court gave judgment for the plaintiff for the amount claimed, and gave leave to appeal.

The provisions in the statutes and rules on which the decision turned are set out in the judgment.

April 12. The appeal was argued by *J. G. Witt*, for the defendant, appellant, and by *R. Henn Collins, Q.C.* (*W. Wills*, with him), for the plaintiff, respondent.

The arguments are stated in the judgment.

1888

THOMAS v. PEEK.

Newman v. *Merriman* (1) and *Royle* v. *Busby* (2) were referred to.

Cur. adv. vult.

April 13. A. L. SMITH, J. In this case the plaintiff, the high bailiff of the County Court of Swansea, sought to recover from the defendant four days' possession money at the rate of 3*s.* 6*d.* per diem for having remained in possession of certain goods under an execution issued, in which the present defendant was execution creditor.

The county court judge gave judgment for the plaintiff.

The defendant appealed, and on his behalf it was argued that the county court judge was wrong, because no authority could be shewn by which the high bailiff in the events which had happened could possibly be entitled to the possession money he claimed from the execution creditor.

It must, in my judgment, be taken as a fact in the case that the execution levied by the plaintiff was useless to the defendant, or, in other words, that the execution levied was not upon the goods of the execution debtor.

It was argued as follows:—

It was said that the high bailiff being a public officer could only recover from the public fees which by statute appertained to his office, and if no such fees so appertained he could recover none. To this proposition I agree.

It was further said that a high bailiff was analogous to a sheriff, and that if a sheriff levies and remains in possession of goods other than those of the execution debtor, without any special order from the execution creditor, he cannot recover possession money from the execution creditor for having so remained in possession.

As regards a sheriff this is so, and the case cited of *Newman* v. *Merriman* (1) supports that contention.

In my judgment, however, it is fallacious to liken a high bailiff in all respects to a sheriff, for a high bailiff is the creature of statute, and it is by what the statute enacts, no more and no less, he and his office is regulated.

(1) 26 L. T. (N.S.) 397. (2) 6 Q. B. D. 171.

The real question in my judgment is, what do the statutes and orders made pursuant thereto enact?

By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 83, the high bailiff is to be paid by salary plus the fees appointed for keeping possession of goods under execution.

By s. 78 of the same Act such fees are to be those set forth in Schedule (C.) to that Act.

By this schedule it is provided as follows:—

"High Bailiff's Fees.

"For keeping possession of goods till sale, per day . . . not exceeding five days, sixpence in the pound on the value of the goods seized, to be fixed by appraisement."

This is re-enacted in the rules of 1886.

This, as it seems to me, applies where the high bailiff has taken the execution debtor's goods in execution, and not where he has taken another man's goods.

Also that in cases of interpleader the judge may allow at the hearing the actual costs incurred by the high bailiff in keeping possession of the goods claimed, and no more.

By s. 79 of this Act power was given to the Commissioners of Her Majesty's Treasury to alter these fees, and a large general power to lay down a scale of fees to be levied is also contained in s. 7 of 38 & 39 Vict. c. 50.

I find that in pursuance of these statutes an order of the Commissioners of Her Majesty's Treasury regulating fees was made, dated December 30, 1867, and also another dated October 26, 1875. (Both are set out at pages 44 and 45 of Mr. Pitt Lewis's work on County Courts, 1880 edition.)

It would seem that upon reading these two orders the result is that only those fees included in Schedule (C.) of the Act of 1856 are abolished, for which new fees are substituted in lieu thereof.

The regulation, therefore, quoad costs of possession to be allowed by a judge to the high bailiff under Schedule (C.), remains intact except in so far as the order hereafter referred to may have cut down the power to award such costs of possession to a high bailiff in certain cases.

1888

THOMAS v. PEEK.

A. L. Smith, J.

In the year 1886 the County Court Rules of that year were duly framed and passed pursuant to statute.

The all important rule upon the question in hand is Order XXVII., r. 1, which will be found at p. 622 of Mr. Heywood's County Court Practice, 4th ed., 1886. The material parts are as follows: where a claim is made in respect of goods taken in execution, if the execution creditor admits such claim and gives notice thereof in manner by the rule provided, "he shall only be liable to the high bailiff for any fees of possession or expenses incurred prior to the receipt of such notice."

The appellant argued that this rule did not give the right to the fee now claimed. The respondent argued that it did. In my judgment it did not, but the true construction of the rule is that it is a limitation of a right, which theretofore existed in the high bailiff, to get the judge to give him possession money if he could.

As I read the legislation upon this point, by Schedule (C.) of the Act of 1856 the judge may allow at the hearing of an interpleader to the high bailiff the actual costs of possession incurred by him.

By s. 31 of the Act of 1867 (30 & 31 Vict. c. 142) the high bailiff may set in motion an interpleader where a claim is made to the goods he has taken in execution, and in such proceedings the judge may award to the high bailiff the costs of possession.

It seems to me that there is here no limitation upon the power of the judge so to award, as is suggested by the appellant, viz., that he could only award possession money where the execution was effective to the execution creditor, though obviously if not effective it might be a good ground for the judge refusing the same. There may, however, well be circumstances in which, although the high bailiff has taken and held wrong goods, he should be entitled to possession money. The judge, in my judgment, had the *power* to award such possession money to the high bailiff, though the execution was non-effective by reason of not being upon goods of the execution debtor, and whether he would do so or not was a matter purely for his discretion.

The difference in this respect between a sheriff and a high

bailiff as it seems to me is that under the table of fees set forth under 7 Will. 4 & 1 Vict. c. 55 (1), the sheriff is not entitled to his 3*s.* 6*d.* per diem possession money if he has levied on the wrong goods, because that statute does not give such fees in that event, whereas in the case of a high bailiff he may under like circumstances get possession money if the judge so directs.

In my judgment by Order XXVII., r. 1, provision is made that where an execution creditor admits a claimant's claim as by the rule is provided, such execution creditor is only to be liable for the high bailiff's possession fees or expenses up to the date at which he (the execution creditor) gives notice that he admits the claim, and not after, and in such a case the judge could not award him more, whereas before the rule he would have been liable to have been mulcted by the judge in the whole possession money up to the date of the hearing, if possession had been so long kept, if the judge had so determined.

In my judgment Order XXVII., r. 1, not being a grant of a new fee, but, as before stated, a limitation put upon what might theretofore have been allowed by a judge against an execution creditor in favour of a high bailiff, is well within the powers given by statute to make rules and regulations relating to procedure and practice.

I will also add that in my opinion, considering the eminent persons by whom the rule was framed and adopted, the phraseology of it is cogent to shew that there had existed theretofore the power in the judge to award costs of possession as I have before pointed out in fact to have existed.

I am therefore of opinion that under the circumstances of the case the county court judge had the power to award to the plaintiff possession money for the four days he was in, that there was no excess of jurisdiction or error in law in his having done so, and that this appeal must be dismissed.

The judgment must stand against the execution creditor alone, and not against his solicitors, if it has been so entered, but, inasmuch as it seems to me each party was wrong in the position

(1) Repealed by 50 & 51 Vict. c. 55, s. 39; but by sub-s. 5 the fees and poundage authorized by the repealed Act may continue to be taken until altered in pursuance of the new Act.

1888

THOMAS v. PEEK.

he took up before the judge, viz., the one insisting that by law he was entitled to the fees, and the other that by law he was not, that this appeal should be dismissed without costs.

Should, however, the defendant desire to go before the county court judge and contend that in his discretion he (the defendant) should not have the 14*s.* awarded against him, then I think he is entitled to do so, otherwise the judgment of the county court judge against the execution creditor is to stand.

CAVE, J. I have had the opportunity of reading my learned Brother's judgment, and I entirely concur in it.

Appeal dismissed.

Solicitors for plaintiff: *Burton & Co., for G. & R. M. Thomas, Carmarthen.*

Solicitor for defendant: *E. W. Williamson, for T. W. Hearfield & Lambert, Hull.*

P. B. H.

April 16.

[IN THE COURT OF APPEAL.]

HANCE AND ANOTHER *v.* HARDING.

Bankruptcy—Settlement by Trader—Purchaser for Valuable Consideration—Dealing with Bankrupt in Good Faith and for Valuable Consideration—Apothecary—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 91, 94.

By a post-nuptial settlement made in pursuance of an arrangement between the settlor and his father, the settlor assigned a policy of insurance upon his life to trustees on trusts for the benefit of his children, the settlor's father at the same time conveying certain leasehold property to the trustees on similar trusts. The transaction was entered into in good faith for the purpose of securing a provision for the children, and not with any intention to defraud or defeat the settlor's creditors.

The settlor having become bankrupt within two years from the date of the settlement and subsequently dying, the official receiver in bankruptcy claimed the money payable under the policy on the ground that the settlement was void under the 91st section of the Bankruptcy Act, 1869:—

Held, that the settlement was valid, on the ground either that it was not within s. 91 of the Bankruptcy Act, 1869, the bankrupt's father being a purchaser in good faith for valuable consideration within that section, or that it was protected under s. 94, sub-s. 3, of the same Act, as being a dealing with the

bankrupt by the father made in good faith and for valuable consideration without notice of any act of bankruptcy. (1)

Ex parte Hillman, In re Pumfrey (10 Ch. D. 622), discussed and explained.

A medical man practising as a general practitioner dispensed medicines to his patients but charged by the visit irrespectively of the medicine supplied, which was covered by the charge for the visit:—

Held, that he was not a trader in drugs within the meaning of the Bankruptcy Act, 1869.

APPEAL from the judgment of Huddleston, B., upon the trial of an interpleader issue before him without a jury.

The facts were, so far as material, as follows. The issue was to try the title to the money payable under a policy of life insurance, the plaintiffs claiming it as trustees of a post-nuptial settlement executed by one Peskett, who had subsequently become bankrupt, and the defendant claiming it as official receiver in the bankruptcy. By the settlement, which was dated 25th November, 1882, the bankrupt assigned to the plaintiffs, as trustees upon trusts for the benefit of his children in equal shares, two policies of insurance upon his life, one of which was the policy in question; and by a deed of even date the bankrupt's father conveyed to the plaintiffs as trustees certain leasehold property, upon trust during the bankrupt's lifetime to apply the income thereof to payment of the premiums on the policies, and as to any surplus remaining upon certain trusts for the benefit of the bankrupt, and after his death on trust for his children in equal shares; and the father also released a debt of 107*l.* due to him from the bankrupt. The leasehold property so assigned by the father was bringing in about 70*l.* per annum at the time, and afterwards sold for 700*l.*, and it was admitted that the surrender value of the two policies was about 700*l.*

It appeared that the bankrupt was a medical man who practised as a general practitioner. An affidavit made by him in the course of the bankruptcy proceedings was produced, in which he described himself as a surgeon and apothecary, and three receipts signed by him for lump sums charged to patients "for attendance and medicine" were put in, but it was stated in evidence by one of the witnesses, who had been his assistant, that, though he did dispense medicines to patients, no charge was ever made for such

(1) See ss. 47 and 49 of the Bankruptcy Act, 1883.

1888

HANCE v. HARDING.

medicines, his practice being to charge by the visit, irrespectively of the medicine supplied. The evidence for the plaintiffs was to the effect that, the bankrupt having become entangled in an immoral connection with a woman, upon whom he was spending considerable sums of money, and having contracted habits of intemperance, his father (who was since deceased) had become anxious that some provision should be secured for the bankrupt's family, and to induce the bankrupt to make such provision he had agreed to bring the leasehold property into the settlement and to release the debt due to himself; and that in making this arrangement and executing the settlement the object was not to defeat the bankrupt's creditors but to secure a provision for his family under the circumstances above-mentioned.

It was shewn that at the time when the settlement was executed the bankrupt was making a considerable professional income; but the evidence for the defendant proved that undoubtedly he was pecuniarily embarrassed and was being pressed by his creditors. It was suggested for the defendant that from the circumstances under which the settlement was executed (the whole of which it is not thought necessary to set out in detail for the purposes of this report), the inference ought to be drawn that the father knew of the son's pecuniary embarrassment and the pressure put upon him by his creditors, and that the arrangement was made and the settlement executed for the purpose of defeating such creditors. Peskett the son became bankrupt in July, 1883 (within two years from the date of the settlement) and died in 1886. The contention for the defendant was that under the circumstances the settlement was void as being a fraud on creditors under the statute 13 Eliz. c. 5, or, if not void under that statute, that it was void, as being a voluntary settlement made by a trader, under s. 91 of the Bankruptcy Act, 1869.

The learned judge at the trial found that the settlement was not made for the purpose of defrauding creditors, and that the bankrupt was not a trader, and he held that, even if he were, Peskett the father being a purchaser in good faith for valuable consideration, the settlement was either not within s. 91 of the Bankruptcy Act, 1869, or was protected under s. 94, sub-s. 3. He therefore gave judgment for the plaintiffs.

Lockwood, Q.C., and *C. K. Francis*, for the defendant. The proper inference from the facts proved is that the father was well aware of the son's pecuniary position, and that the intention with which the arrangement was made between them and the settlement executed was to defraud or delay the son's creditors and deprive them of their remedy against his property; if that were the intention the settlement by the bankrupt would be none the less void under 13 Eliz. c. 5, because the father himself settled property at the same time on the bankrupt's family. Secondly, the settlement by the bankrupt was void under the Bankruptcy Act, 1869, s. 91. That section provides that "any settlement of property made by a trader, not being a settlement made before or in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt." The evidence shews that the bankrupt was a trader within the meaning of the Act. He sold drugs to his patients as is shewn by the receipts produced. It is immaterial that he did not specifically apportion his charges between attendances and medicines, if he charged for the medicines. The schedule to the Act includes "apothecaries" in the enumeration of the different sorts of traders. They cited on this point *Ex parte Crabb, In re Palmer.* (1)

The father was not a purchaser for valuable consideration within the meaning of the 91st section. It has been held by the Court of Appeal in *Ex parte Hillman, In re Pumfrey* (2), that the word "purchaser" in the section must be read in the ordinary mercantile, and not in the legal sense of the term. The section contemplates a consideration moving to the bankrupt from the person to whom or in whose favour the conveyance is made. The assignment by the father of the leaseholds was no consideration to the bankrupt, nor was there any consideration moving from the trustees or the beneficiaries for the assignment by the bankrupt of the policies.

(1) 8 De G. M. & G. 277.

(2) 10 Ch. D. 622.

1888

HANCE v. HARDING.

[They also cited *In re Johnson* (1); *Ex parte Chaplin.* (2)]

R. T. Reid, Q.C., and *Herbert Reed*, for the plaintiffs.

[THE COURT intimated that they need not argue on the question whether the settlement was void under the statute of Elizabeth.]

The case of *Ex parte Daubeney, In re Briden* (3), is an authority to shew that a medical man supplying drugs to his patients only is not a "trader" for this purpose. Assuming that the bankrupt was a trader, the settlement is not within the 91st section, the father being a purchaser in good faith and for valuable consideration. The language used by the Court in *Ex parte Hillman, In re Pumfrey* (4), must be read with reference to the subject-matter there in question. The only question there was whether trustees of a voluntary settlement made without any valuable consideration were purchasers within the section, and it was said with reference to such trustees that, though they might be purchasers in the strict legal sense of the term, they were not purchasers within the section. No doubt the sense in which the term "purchasers" is used in the section is not the sense which it bears in real property law; it would not include the grantee under a purely voluntary conveyance: it must mean a person who gives value, but it cannot be confined to "purchasers" in the sense in which the term is used with regard to a sale of goods.

Furthermore, the settlement being a dealing entered into by the father with the bankrupt in good faith and for valuable consideration without notice of any act of bankruptcy is protected by s. 94, sub-s. 3, of the Bankruptcy Act, 1869. (5)

Lockwood, Q.C., in reply. Sect. 94, sub-s. 3, has no application. That section contemplates a dealing of some person with the bankrupt for valuable consideration moving from that person to the bankrupt, where the bankrupt's estate gets a quid pro quo. Here no consideration really moved to the bankrupt.

(1) 20 Ch. D. 389.
(2) 26 Ch. D. 319.
(3) 2 Dea. 72.
(4) 10 Ch. D. 622.
(5) Apart from the contention that the settlement was fraudulent, there appeared to be no suggestion of any "act of bankruptcy" of which the father had knowledge at the time of the settlement.

LORD ESHER, M.R. It appears to me, on consideration of all the circumstances, that the motives of both of the parties to this settlement had no regard to the son's being pressed by his creditors or to any tangible probability that the son would become insolvent or bankrupt, but had regard to another matter altogether, viz. to the fact that the son had become involved in an unfortunate connection, and had contracted intemperate habits, and that his conduct in these respects was likely to lead to family difficulties and misfortunes, and to injure his family; and I think that such probability of injury to his family was the consideration which led both the father and the son to make this settlement, and not any consideration having regard to the son's creditors or what was likely to happen to them. Looking to the amount of professional business that the son was doing, and to the relative amount of his debts and means at the time, I do not think it would be right to draw the inference that the settlement was executed in contemplation of his insolvency or bankruptcy, or with any intention of defrauding or of defeating or delaying his creditors. The judge at the trial came to the conclusion that these parties were not guilty of any fraud upon creditors, and, that being so, I think there ought really to be an almost overwhelming case to induce us to interfere and to say that he was wrong. So far from that being so, I do not think there is any evidence upon which we ought to find that he was wrong, or that there was any fraudulent intention in executing this settlement; and it therefore follows that the settlement is not void under the statute of Elizabeth.

But the question remains whether the settlement is avoided by s. 91 of the Bankruptcy Act, 1869, or is protected by any of the exceptions contained in that section, or, if not so protected, whether it is protected by s. 94 of the Act. The question whether it is protected by s. 91 appears to depend on whether the father can in this case be considered a bonâ fide purchaser for valuable consideration within the section. With regard to his bona fides, I have already sufficiently expressed my opinion. Then can he be called a purchaser? He has given something to get something for other persons, viz. the family of his son. He has given up his interest in certain leaseholds to induce his

1888

HANCE v. HARDING.

Lord Esher, M.R.

son to give up his interest in these policies. That being so, I think he is a purchaser from the bankrupt within the meaning of the section. It is said that there is a decision in the Court of Appeal by which of course we are bound, if in point, to the effect that he is not such a purchaser, and that the term "purchaser" in the section must be limited to a purchaser in the mercantile sense of the term, viz. a person who has bought something by contract of purchase and sale. I do not think that the case of *Ex parte Hillman, In re Pumfrey* (1), goes that length. In that case the trustees of the settlement, who were alleged to be purchasers, had not given something to procure something for other persons. Though they might in conveyancing law language be called "purchasers," they had not given anything at all. I think the case only goes the length of saying that such purchasers as those were not purchasers within the section, and that in order to make a purchaser within the section there must be valuable consideration given. I think there was such consideration here, for the father gave something in order to induce the son to give something.

Then with regard to the 94th section, sub-s. (3), it seems to me still more clear that this settlement is protected under that provision. The father, in good faith, to induce the son to do what he ought for his family, did enter into a dealing with his son, and gave valuable consideration for what he induced the son to do. Assuming, therefore, that the bankrupt was a trader within the meaning of s. 91, this settlement is, in my opinion, protected by the terms of both sections, and is, therefore, good.

With regard to the question whether he was a trader, I think the effect of the evidence was, that he carried on his profession in the way in which, I believe, general practitioners very often carry it on at the present day, viz., though he dispensed medicines to his patients, he did not charge for the medicines, but by the visit. I am disposed to think that such a dealing with medicines is not selling medicines as a trader, and that a person is not a trader who merely does what he did in this respect. I do not think that the fact of the three accounts sent in by him being headed "for attendance and medicine" has really much effect on the

(1) 10 Ch. D. 622.

1888

HANCE v. HARDING.

Lord Esher, M.R.

matter in question; it is only the common form in which such accounts are often sent in by persons carrying on business as he did. I think what was said in the case of *Ex parte Daubeney* (1) is really in point to shew that the bankrupt was not a trader within the meaning of the 91st section. For these reasons I think the appeal must be dismissed.

SIR JAMES HANNEN. I am of the same opinion. I think the evidence entirely supports the conclusion of the learned judge in the court below, viz., that the transaction was entered into by all parties with perfect bona fides, and had nothing to do with any intention to defeat the son's creditors, but was dictated by prudential motives having reference to the necessity for protecting his family, which had arisen out of his conduct with some woman with whom he had become connected. Therefore the transaction is perfectly valid, unless it comes within the terms of s. 91 of the Bankruptcy Act, 1869. The question whether it does so appears to depend on the meaning of the word "purchaser" as used in that section. In *Ex parte Hillman, In re Pumfrey* (2), Jessel, M.R., was dealing with a case in which the conveyance was purely voluntary, without any consideration moving from or to either of the parties: and with reference to that case his language must be interpreted as meaning that the word "purchaser" must not be treated as a conveyancing term, but must be considered as applying to cases where there is a quid pro quo. Here there was an ample quid pro quo. The father in effect tells the son that he ought to do something for his family, and, if he will, he, the father, will do something also. That appears to me to be a perfectly valid consideration, and I think that the father was a purchaser within the 91st section. With regard to the effect of s. 94, I need add nothing to what was said by the Master of the Rolls.

With regard to the question whether the bankrupt was a trader: the question is not whether he described himself, or was described as, an "apothecary," but, whether he acted as such in the sense of being a trader in drugs. At first I felt some doubt on this point, but I think, on the whole, it is pretty clear on the evidence that he did not sell drugs for profit, but gave the medicine in,

(1) 2 Dea. 72. (2) 10 Ch. D. 622.

1888

HANCE v. HARDING.

charging by the visit. The case of *Ex parte Daubeney* (1) seems to be an authority to shew that dealing with drugs in that manner is not trading in them for this purpose.

Appeal dismissed.

Solicitor for plaintiff: *Castle.*

Solicitors for defendant: *Wilkinson & Raikes.*

E. L.

1887 *Nov.* 28; 1888 *April* 25.

THE QUEEN *v.* THE ARCHBISHOP OF YORK.

Ecclesiastical Law—Mandamus—Convocation—Archbishop as President of Convocation—Election of Proctor.

The Archbishop of York as president of the Convocation of his province having decided that a candidate who had been elected to represent an archdeaconry in the Lower House was disqualified:—

Held, that the Court had no jurisdiction to grant a mandamus commanding the Archbishop to admit the candidate to Convocation.

RULE calling upon the Archbishop of York as president of the Convocation of the province of York to shew cause why a mandamus should not issue directing him to admit into Convocation the Rev. Canon Tristram as a proctor duly elected to represent the clergy of the archdeaconry of Durham in the Lower House.

It appeared that the applicant was second in the poll for the election of two proctors to represent the clergy of the archdeaconry of Durham in 1886. He was then a canon residentiary of Durham Cathedral, which is situated within the archdeaconry of Durham, but he had not otherwise a benefice within the archdeaconry of Durham. It was objected that his canonry, which qualified him to vote at the election of a representative of the chapter or himself to represent the chapter, was not a benefice within the archdeaconry, and that he was, therefore, not qualified to vote at an election of proctors, or himself to be elected a proctor, for the clergy of the archdeaconry. The Archbishop of York, as president, held that the applicant was disqualified, and declared a clergyman beneficed within the archdeaconry who was third in the poll duly elected.

(1) 2 Dea. 72.

1888

THE QUEEN v. ARCHBISHOP OF YORK.

The Court directed that the question of jurisdiction should be first argued.

The *Archbishop of York*, in person, shewed cause. The rule should be discharged. The Court has no jurisdiction over either Archbishop as president of the Convocation of his province. The two Convocations, which are older than Parliament, and equally with Parliament a part of the constitution, are at once ecclesiastical synods and spiritual Courts, and as such are not subject to the secular jurisdiction. They are summoned by the Archbishops at the same time as Parliament, in obedience, like Parliament, to a royal writ. In the case of Parliament the writ is directed to the Lord Chancellor, in that of Convocation to the Archbishop as Metropolitan. But the act of the Lord Chancellor in carrying out the command of the Crown is ministerial, whereas that of the Archbishop is an exercise of his own inherent spiritual authority, subject to and limited by statute 24 Hen. 8, c. 12, and statute 25 Hen. 8, c. 19, under which the Crown was made supreme in ecclesiastical as in civil causes. Under these Acts the Metropolitan cannot as formerly summon the Convocation of his province at his discretion. He requires the leave of the Crown, but its leave is given in the form of a direction to him to exercise his own spiritual authority. In the case of Parliament the Houses are summoned by the Lord Chancellor and the sheriffs to attend on the Sovereign at Westminster. In the case of Convocation the mandate of the Archbishop, reciting the express words of the royal writ which removes the statutory restraint (1), summons the clergy to attend on himself at the

(1) The writ was as follows: "Victoria, &c., to the Most Reverend Father in God our right trusty and well-beloved councillor William, by the same grace Archbishop of York, Primate of England and Metropolitan, greeting: By reason of certain difficult and urgent affairs concerning us, the security and defence of the Church of England, and the peace and tranquillity, public good, and defence of our kingdom and our subjects of the same, We command you, entreating you by the faith and love which you owe us that, having in due manner considered and weighed the premises, you call together with all convenient speed in lawful manner all and singular the bishops of your province and deans of your cathedral churches, and also the archdeacons, chapters, and colleges, and the whole clergy of every diocese of the same province, to appear before you in the cathedral church of Saint Peter, York . . . to treat of, agree to, and conclude upon

1888

THE QUEEN v. ARCHBISHOP OF YORK.

chapter house of his cathedral. (1) In the old forms in Bishop Gibson's Synodus Anglicana (2) the royal writ says "coram

the premises and other things which to them shall then at the same place be more clearly explained on our behalf. And this as you love us, the state of our kingdom and honour and good of our aforesaid Church, by no means omit, Witness, &c."

(1) The mandate addressed by the Archbishop of York to the Bishop of Durham, after reciting the writ, continued: "Wherefore we peremptorily cite you and by you the dean and chapter of Durham, your archdeacons and the whole clergy of each of the archdeaconries within your diocese of Durham aforesaid, and we will and command that they be so cited by you, and that you appear personally or by your lawful proctor, that the said dean appear personally or by his lawful proctor, and that each of the said archdeacons appear personally or each by his lawful proctor, that the said chapter appear by one proctor rightly elected and lawfully constituted, that the whole clergy of each archdeaconry within your said diocese do appear by two proctors rightly elected and lawfully constituted, before us or our lawful representative in our chapter-house within the cathedral and metropolitan church of Saint Peter at York or . . . with continuation and prorogation of days and places, as occasion shall require, to treat upon such causes as in Her said Majesty's writ are contained, expressed, and specified, together with us or our lawful representative and others the prelates and clergy of the province of York, and to give your and their wholesome advice of and concerning the premises, and to consent to those things which shall seem expedient, or dissent from such things as shall seem inconvenient, and, further, to do and receive what the nature and quality of this provincial Convocation shall demand and require, &c."

(2) See Bishop Gibson, Synodus Anglicana, London, 1702, Method of summoning an English Convocation, p. 15: "A writ to this effect and for some hundred years in this very form has been all along directed to the Archbishop whenever the King had resolved that a Convocation should be summoned. Upon the reception whereof His Grace always proceeded to summon it in the fixed and canonical method that he ever used in calling of Convocation upon his own motion, without that writ. For though the King, as having a right to the assistance of the clergy, had also a right to be obeyed by the Archbishop in calling them together for that end, yet in the despatch of the business he left them to proceed according to the known rules of a provincial synod, viz., to be summoned before their Metropolitan and to the place he should think fit to appoint, and in the manner that was usual in all other Convocations. For the Archbishop had a right to call a Convocation at pleasure till the statute 25 Hen. 8, c. 19, absolutely restrained him from doing it unless empowered by the King's writ; which effected this alteration in the summons, that, whereas before it was issued sometimes upon the pleasure of the Prince signified to the Archbishop, and sometimes upon the Archbishop's alone, the authority of the summons in both resting equally in his Grace; now he is restrained from the exercise of that authority till he receive leave or direction from the Prince; the summons, upon that in-

vobis," the archiepiscopal warrant "coram nobis." Also the Convocation is to be summoned "modo debito," that is, according to the custom of the province. According to the customs of both provinces it is for the Archbishop, as president, to decide questions of disputed election. (1) As regards his decisions he is responsible to the Crown alone as head of the Church, and they cannot be questioned except by an address to the Crown.

No writ of mandamus has ever been issued by the Court of Queen's Bench with respect to subjects of ecclesiastical cognizance or with respect to the acts of a visitor within the scope of his authority: *Rex* v. *Coleridge* (2); *Rex* v. *Churchwardens of St. Peter's, Thetford* (3); *Rex* v. *Taylor* (4); *Rex* v. *Bishop of Ely* (5); *Appleford's Case.* (6) No instance is to be found of the interference of the Court by mandamus or otherwise with the decisions of the Archbishop with respect to disputed elections. In one case only, *Randolph* v. *Milman* (7), the qualification of voters at elections to Convocation has been considered; but there a special case was stated by consent, and the question of jurisdiction was not raised.

Tristram, Q.C., and *Jeune*, in support of the rule. The Court has jurisdiction to grant the mandamus. The question is whether the Queen's writ has been duly executed by the Archbishop of York. If it has not been duly executed a mandamus ought to issue.

The Convocations were revived in 1861, after having been prorogued for a century and a half. There may well therefore be no reported case where the Court has interfered in the election of a member of Convocation. The writ, however, does not in terms or by implication invest the Archbishop with authority to adjudicate, and he does not rest his claim on any statute or charter. As to the so-called custom of the province, the affidavits which have been filed on both sides do not shew any uniform practice.

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timation of the royal pleasure, being still issued in his Grace's name and under the archiepiscopal seal, that is remaining as properly authoritative as ever."

(1) See Gibson, Synodus Anglicana, pp. 256–267.

(2) 2 B. & Ald. 806.

(3) 5 Term Rep. 364.

(4) 1 Phill. Eccl. Law, 843.

(5) 2 Term Rep. 290.

(6) 1 Mod. 83, 84.

(7) Law Rep. 2 C. P. 60; (Ex. Ch.) 4 C. P. 107.

1888

THE QUEEN v. ARCHBISHOP OF YORK.

In the case of parliamentary elections before the passing of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), inquiries as to disputed elections were conducted by a committee of the House of Commons in accordance with the established custom of Parliament. Had they been conducted sometimes by the Lord Chancellor, sometimes by the Speaker, sometimes by a committee of the House, there would have been no parliamentary custom. This is the case as regards the Convocation of York, and, this being so, because there is no other remedy, a clergyman who complains that his election as proctor has been annulled in a manner which he conceives to be wrongful, is entitled to apply to the Court for a mandamus.

It has been held that a mandamus lies to the archdeacon, who is the returning officer in the election of churchwardens, to compel him to admit a duly elected churchwarden; *Rex* v. *White* (1); *Rex* v *Harwood*. (2)

Cur. adv. vult.

1888. April 25. The judgment of the Court (Lord Coleridge, C.J., Pollock, B., and Hawkins, J.), was delivered by

LORD COLERIDGE, C.J. In this case the Archbishop of York was called upon to shew cause why a writ of mandamus should not issue directed to him commanding him to order that the name of Henry Baker Tristram, clerk in holy orders, and one of the canons of the cathedral church of Durham, be called as one of the proctors for the archdeaconry of Durham, and otherwise to admit him to act as such proctor in the Convocation of the province of York.

The facts out of which this application has arisen are few, simple and undisputed; but they give rise to a variety of historical and legal questions not perhaps easy of solution if it were necessary to solve them.

In the Northern Convocation the parochial clergy are and have been for centuries represented by two proctors from each archdeaconry within the province of York; in addition to these, there are, as in the province of Canterbury, the dean of each

(1) 2 Ld. Raym. 1379. (2) 2 Ld. Raym. 1405.

cathedral, the archdeacons, and a representative of each cathedral chapter. The Archbishop is, as in the southern province, the president of the Convocation.

In the month of July, 1886, a fresh Convocation was summoned, and in the archdeaconry of Durham the election of the two proctors to be returned as representatives of the parochial clergy of that archdeaconry was a contested one. [His Lordship read passages from the affidavit stating the circumstances, and the decision of the Archbishop of York.] Whether the decision of the Archbishop was correct in point of law is a matter on which we offer no opinion, an expression which must not be taken as suggesting anything in any way unfavourable to it; but simply that, as we have not had the matter argued, we think it better to be silent. Before any argument upon his Grace's decision, the question must be decided whether we have any jurisdiction to inquire into it, whether this Court is a Court of Appeal from the Archbishop, and can correct any errors of his committed in his conduct of the affairs of his Convocation, supposing that he has in fact committed any errors. This, it must be observed, is not a case in which the Archbishop has declined to act. If it were, different considerations might arise; and our judgment might be, though we do not say it would be, different. It is a case in which he has acted and has decided; and the application though in form for a mandamus is in truth and substance an application to us to annul his act and reverse his decision. Have we any such jurisdiction as the application assumes?

It is conceded that our jurisdiction is invoked for the first time during the many centuries of the existence of the Convocations; and in face of the fact that contested elections must have, and have in fact, occurred in which the defeated parties might have had recourse to our jurisdiction to correct the decisions of the primates, if such jurisdiction had in fact or in law existed. Nor is this surprising, if the history and constitutional position of these bodies is recollected. Our supposed jurisdiction, it must be remembered, rests on no statute; if it exists at all, it exists at common law, and existed therefore in days when Convocations were as important as Parliaments, as independent, perhaps as powerful. This writ, if the argument be correct, might have

1888

THE QUEEN v. ARCHBISHOP OF YORK.

Lord Coleridge, C.J.

been directed to Chichele or Sudbury to Scrope or Wolsey as well as to Archbishops Benson or Thomson.

What was the exact origin of Convocation, at what point of time it was divided into two bodies, whether it be the synod of the nation, whether it be, as the 139th canon decrees, "the true Church of England by representation," these are questions antiquarian rather than practical, and need not detain us now. Probably in some shape it is older than Parliament; certainly in the time of Edward I. and Edward II. there were attempts made, partially and temporarily successful, to incorporate it into Parliament. The clergy are still summoned in the writs, addressed at the beginning of each Parliament to the archbishops and bishops of England (and it was the same in Ireland before the disestablishment), though this has long ceased to be anything more than an obsolete form. The old writ remains a piece of historical evidence; but the separation of Convocation and Parliament has been complete since the days of Richard II. if not of Edward III. In Convocation the clergy not only passed canons with the King's consent, but taxed themselves, which like many a right once earnestly contended for as a privilege, became in lapse of years a burden, and was finally extinguished about 1665 in consequence of a verbal and wholly informal agreement between Archbishop Sheldon and Lord Clarendon, who was at that time Lord Chancellor. (See Speaker Onslow's note in the Oxford Edition of Burnet's Own Time, vol. i., p. 302.)

Convocation, as appears from the collection of precedents in the Codex of Gibson, which for this purpose is a good authority, was summoned not directly by the King's writ, but by the writ of the archbishop and bishops, the archbishop being set in motion by the King, and, as Dr. Burn tells us, for the most part varying in his summons from the King's writ both as to the time and place of meeting. In his Convocation, Burn continues "the archbishop sat as king, his suffragans sat in the upper house as his peers, the deans, archdeacons and proctor for the chapter represented the burghers; and the two proctors for the clergy the knights of the shire. And so this body, instead of being one of the estates as the King (Edward I.) designed, became an ecclesiastical parliament to make laws and to tax the possessions of the clergy." (Burn,

ed. 1842, vol. ii., pp. 22, 23.) To the members of Convocation were accorded by the 8 Hen. 6, c. 1, "for the security and quiet of the prelates and clergy for ever hereafter such liberty and defence in coming, tarrying and returning as the great men and commonalty of the realm called or to be called to the King's Parliament do enjoy, and were wont to enjoy or in time to come ought to enjoy." All this and much more as to the powers and privileges of Convocation may be collected from the precedents in Gibson above-mentioned, and is set out shortly and clearly in Godolphin's Abridgement, p. 586 et seqq. Its antiquity appears from him whom Godolphin calls "Mr. Bede," and the passage in Lord Coke's 4th Institute devoted to Convocation shews the respect which he—no favourer of ecclesiastical pretensions—thought due to Convocation while it kept within the limits prescribed to it by the ancient English constitution. Blackstone, bk. 1, chap. 7, is to the same effect. The whole history of the junction of Convocation with Parliament and its subsequent separation is to be found in Fuller's Church History, bk. v., and in Collier's Ecclesiastical History, 4th and 5th volumes of the London edition of 1841.

In the case of *Bird* v. *Smith* (1) it was held by Lord Ellesmere, who was assisted by the two Lord Chief Justices Popham and Coke and the Lord Chief Baron Fleming, that canons passed by Convocation on ecclesiastical matters with the assent of the king bound the whole realm. One of the reasons given in the report for this judgment is that the Convocations originally were and in law continued to be part of the Parliament of England. The point indeed as to the binding effect of the canons must be considered as overruled by Lord Hardwicke in the famous case of *Middleton* v. *Croft* (2), a case repeatedly acknowledged as law, and especially by the Court of Common Pleas in *Marshall* v. *Bishop of Exeter* (3). But the historical reasons remain true as history and indeed cannot be denied. Further it was seriously debated in the time of Charles I., 1640, whether by a dissolution of Parliament, Convocation was also dissolved. In fact, fortified by the opinion of the Lord Keeper Ford and Littleton Chief Justice of the Common Pleas, that Convocation continued to sit

(1) Moore, 781.

(2) 2 Str. 1056 a; 2 Atk. 650.

(3) 7 C. B. (N.S.) 653.

1888

THE QUEEN v. ARCHBISHOP OF YORK.

Lord Coleridge, C.J.

after Parliament was dissolved and passed several canons. It would not be wise to rely on the authority of a precedent created by Charles I. and under the primacy of Laud; but the very contention is a proof both of the ancient rights and the absolute independence of Convocation; and the notion of the King's Bench of that day interfering by mandamus to command the archbishop to admit a particular proctor to sit and vote in Convocation was one which assuredly no judge of that time would have even for a moment entertained. Indeed the celebrated judgment of Lord Hardwicke in *Middleton* v. *Croft* (1), which Mr. Justice Vaughan Williams in *Marshall* v. *Bishop of Exeter* (2) described as "a prodigy of industry and learning," is founded upon the broad distinction which exists between the power of Convocation and its privileges when acting within its own jurisdiction and upon its own subjects, and the power of the same body when it attempts to bind the laity and to impose anything, even ecclesiastical in its nature, on the nation without the authority of Parliament.

What we are asked to do is to interfere in the internal affairs of an ancient body as old as Parliament and as independent, to control the action of its president, and to revise or reverse his decision on a matter relating to the constitution of the body itself. For 700 or 800 years it is conceded that no precedent for such an interference can be found. Such an interference would not only be without a shadow of precedent but would be inconsistent with the character and constitution of the body with which we are asked to interfere. Accordingly we discharge the rule and with costs.

Rule discharged.

Solicitors for the applicant: *Dangerfield & Blythe.*

(1) 2 Str. 1056 a; 2 Atk. 650. (2) 7 C. B. (N.S.) 653.

H. D. W.

THE ASSESSMENT COMMITTEE OF THE FULHAM UNION, Appellants *v.* WELLS and Others, Respondents. 1888 *April* 23.

Metropolis—Valuation Acts—Provisional List—Assessment Committee—Special Sessions—Appeal—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 47.

An appeal does not lie to special sessions from the determination of the assessment committee on an objection to a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869.

Case stated by special sessions.

A provisional list was made under s. 47 of the Valuation (Metropolis) Act, 1869 (1), fixing the gross and rateable value of an

(1) The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), provides for the making of valuation lists in the Metroplis.

Sect. 18. "In every petty sessional division in the Metropolis the justices of the peace acting in and for such division shall, in every year at the time mentioned in this Act, hold a special sessions for hearing appeals under this Act against the valuation lists of the several parishes within such division."

Sect. 19. "Any ratepayer and any overseers of a parish, so far as respects the valuation list of such parish, and any surveyor of taxes, so far as respects the valuation list of any parish in the petty sessional division, may if he or they feel aggrieved by any decision of the assessment committee on an objection made with respect to the unfairness or incorrectness of the valuation of any hereditament included in such list, but not otherwise, appeal against such decision to the special sessions. The right to appeal to special sessions shall not deprive a person of any other right of appeal conferred on him by this Act."

Sect. 46 provides for the revision of the valuation list, in each of the first four years of every period of five years by a supplemental list, and in the fifth year of every such period by a new list.

Sub-sect. 3. "The same regulations shall be observed and the same proceedings shall be had in the case of a supplemental list and a new valuation list as are directed by this Act and the Acts incorporated herewith in the case of the valuation list made in the first year after the passing of this Act."

Sect. 47. "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect":—

Sub-sect. 1. "The overseers of the parish in which such hereditament is situate may and on the written requisition of the assessment committee, or of any ratepayer of the union, or of the surveyor of taxes for the district, shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament."

* * * * *

Sub-sect. 4. "An objection may be made to any such provisional list by

1888

ASSESSMENT COMMITTEE OF FULHAM UNION v. WELLS.

advertising hoarding. The assessment committee having heard and determined on an objection made to the provisional list, the present respondents appealed from such determination to the special sessions. It was objected on behalf of the assessment committee that no appeal lay. The sessions heard the appeal, and stated this case.

The question for the opinion of the Court was whether the special sessions had jurisdiction to entertain the appeal.

Poland (*A. Glen*, with him), for the appellants. An appeal does not lie to special sessions against a provisional list.

In the case of the original list an appeal was given by ss. 18 and 19 of the Act, and these provisions are extended to the supplemental list and the new valuation list by s. 46, sub-s. 3, but s. 47 provides a different mode of objecting to a provisional list, and does not give an appeal. If the value is fixed too high by the provisional list, the ratepayer's proper course is to wait until the next revision of the valuation list, and apply for repayment or allowance of the excess under the concluding clause of s. 47, sub-s. 10.

[A. L. SMITH, J., referred to *Reg.* v. *Justices of General Assessment Sessions for the Metropolis.* (1)]

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the said occupier, and by the surveyor of taxes, or by either of them, by notice thereof in writing being served on the clerk of the assessment committee, on the overseers, on the surveyor of taxes, and on the occupier, or on such of them as the case may require."

* * * * *

Sub-sect. 6. "The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just."

* * * * *

Sub-sect. 10. "A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force, and shall (so far as is necessary) be substituted for so much of that valuation list as relates to the same hereditament, and every rate and tax in respect of which the valuation list is conclusive, which are respectively made or charged after the provisional list comes into force, and the proportion of the current rate charged as before provided in this section, shall be levied accordingly; but if when the next revision of the valuation list takes place, the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed."

(1) 17 Q. B. D. 394.

Winch, Q.C., for the respondents. The first words of s. 47, sub-s. 10, "A provisional list during the time that it is in force shall be deemed to form part of the valuation list for the time being in force," makes the provisional list a part of the valuation list for all purposes, and therefore the provisions of s. 19, giving an appeal to special sessions against any decision of the assessment committee, apply to the provisional list, and give a right of appeal in the present case.

Poland, was not heard in reply.

CAVE, J. I am of opinion that Mr. Poland's contention must succeed on the ground that no appeal lay from the assessment committee to the special sessions. It is undoubted law that an appeal is the creature of statute, and must be expressly given, and cannot be given by inference. The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), provides for making a valuation list, and s. 18, and the sections which follow it, contain provisions as to appeals to special sessions with relation to the list first made. The Act then by s. 46 provides for the revision of the valuation list, which is to be made yearly and quinquennially, yearly by a supplemental list, and quinquennially by a new list. Section 46, sub-s. 3, applies to the cases of a supplemental list, and of a new list, the regulations and proceedings directed by the Act in the case of the valuation list first made. This is strong to shew that ss. 18, 19 and 20 in the first instance would apply only to the valuation list made in the first year after the passing of the Act; but s. 46, sub-s. 3, applies the provisions contained in those sections to the cases of supplemental lists and new valuation lists, and it is clear that this clause gives an appeal to special sessions against a supplemental list and a new list by direct reference to the provisions of s. 19. Then s. 47 contains provisions by which every new subject-matter of taxation is to be drawn in at shorter intervals than a year, so that the owners of buildings built between the times of making the valuation lists may be made to pay an apportioned part of the rates imposed in that interval. The provisions of this section do not operate, as do those of s. 46, sub-s. 3, by reference, re-enacting

1888

ASSESSMENT COMMITTEE OF FULHAM UNION v. WELLS.

Cave, J.

other sections and applying them to a new subject-matter, but s. 47 is express in its terms, and gives power to go before the assessment committee and object to the provisional list, but it stops there, and contains nothing to enable the occupier to go beyond the assessment committee. It is contended for the respondents that sub-s. 10 of s. 47, by which the provisional list "shall be deemed to form part of the valuation list," means that for all purposes it shall be so deemed, but I cannot put such a wide interpretation upon the words of that sub-section. On comparing the words of s. 46, sub-s. 5, we find that it provides that the valuation list which is in force one year, together with, and as altered by, the supplement list, "shall be the valuation list" for the next year, but in s. 47, sub-s. 10, the language is changed, and the expression used is "shall be deemed to form part of the valuation list." Wherever the legislature uses the expression "shall be deemed" that is an indication that it is not intended that the subject-matter to which the expression is applied shall be for all purposes that which by the Act it is to be deemed to be, but only that it shall be so for such purposes as the legislature has in view at the time, that is, in the present case, with reference to the poor-rate in force, and to be levied as if the provisional list formed part of the valuation list.

If there could be any doubt as to this being the true construction it would be made clear by the concluding part of s. 47, sub-s. 10. If it be asked whether where the valuation is manifestly too high there is not an appeal, the answer is that there is not, unless the statute gives one, and the concluding part of s. 47, sub-s. 10, shews that no appeal from the provisional list is given, by providing that if on the next revision of the valuation list the revised list shews a value less than that in the provisional list the amount of rate or tax over-paid shall be repaid or allowed. This would be unnecessary if an appeal were given against the provisional list, and there is no such provision with regard to the supplemental list.

On both the grounds which I have stated I have come to the conclusion that the legislature intended that from the provisional list there should be no appeal, but that the right to recover any

1888

ASSESSMENT COMMITTEE OF FULHAM UNION v. WELLS.

excess should depend on the final valuation when the list is revised, and therefore that no appeal lay from the assessment committee to the special sessions.

A. L. SMITH, J., concurred.

Judgment for the appellants.

Solicitors for appellants: *Nye, Greenwood, & Moreton.*
Solicitors for respondents: *Bolton & Mote.*

P. B. H.

[IN THE COURT OF APPEAL.]

WERLE & Co. *v.* COLQUHOUN.

1888
March 13.

*Revenue—Income Tax—Trade exercised within United Kingdom—Foreigner resident abroad—*16 *&* 17 *Vict. c.* 34; 5 *&* 6 *Vict. c.* 35.

The appellants, a firm of wine merchants at Rheims, employed a London firm to obtain orders for their wine in England. The wine was advertised in England, and the London firm issued circulars from time to time with the authority of the appellants detailing the price and terms of sale. The name of the appellants' firm was put up at the business premises of the London firm and was published in the London Directory with that address. The appellants had no wine in England, and all orders were forwarded to Rheims, and the wine, invoiced in the appellants' name, was packed and sent direct from thence to the customer at his expense and risk. Payments were either made direct to the appellants or to the London firm, who remitted the amount to the appellants without carrying it to any current account. Any bill drawn for payment of wine was sent to the London firm to obtain the acceptance and to hold for the appellants. Formal receipts were sent by the appellants to purchasers for all payments, whether made direct or through the London firm. The London firm were paid by a commission on all wine sold, and the appellants alone were interested in the gain or loss on the sales.

Held, that the appellants exercised a trade within the United Kingdom within Schedule D. of 16 & 17 Vict. c. 34, and were assessable to the income tax in respect of the profits arising therefrom.

APPEAL from a decision of the Queen's Bench Division on a case stated by Commissioners of Income Tax for the city of London.

The appellants were assessed for the year ending April 5, 1885, in the name of their agents Messrs. Fenwick, Parrot & Co., in a sum of 4000*l.* under Schedule D. to 16 & 17 Vict. c. 34, under which duties are granted for and in respect of the annual profits

1888

WERLE & Co. v. COLQUHOUN.

or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom or any profession, trade, employment or vocation exercised within the United Kingdom.

The 5 & 6 Vict. c. 35, s. 41, enables the assessment to be made in certain cases on an agent.

The appellants' firm of Werle & Co. is composed of three persons, all of whom are French subjects and are domiciled and reside in France. The business of the firm is that of vineyard proprietors, champagne makers, and champagne merchants at Rheims in the Republic of France.

The appellants in pursuance of their business are in the habit of forwarding and sending champagne to England. The yearly quantity of wine so forwarded and sent over is very considerable, and the transactions extend over many years. In addition to the wine forwarded and sent to England as above mentioned the appellants carry on a very large business in various other parts of the world, and very large quantities of champagne are annually sold by them for delivery in other countries beside England, all such sales are made on the same terms as those relating to sales to English consumers hereinafter mentioned.

Advertisements in the *Wine Trade Review*, and *Ridley & Co.'s Wine and Spirit Circular*, both publications circulating exclusively among the wine trade, are from time to time issued and published in England of the appellants' wine and price lists, and circulars are from time to time issued and distributed in England by Fenwick, Parrot & Co., with the authority of the appellants detailing the price and terms of sale of the appellants' wine. These circulars are sent to wine merchants and dealers, and not to private consumers.

The appellants have an arrangement with Messrs. Fenwick, Parrot & Co., who carry on general business as wine merchants, under which they act as the sole representatives in England of the appellants for the sale of their champagne at such prices as are from time to time furnished by the appellants, who pay Messrs. Fenwick, Parrot & Co. a commission on all wines sold by the appellants in England, whether through the agency of Messrs.

Fenwick, Parrot & Co. or otherwise. The appel ants do not otherwise remunerate Messrs. Fenwick, Parrot & Co., who pay their own office and other expenses.

Messrs. Fenwick, Parrot & Co.'s place of business consists of a set of offices at 124, Fenchurch Street, in the city of London, which premises are taken in their own name and on their own sole account, and where they carry on their own business as wine merchants. The names of Fenwick, Parrot & Co. alone appear on the outer door, but on an inside window, which can only be seen from the staircase leading to the office of Fenwick, Parrot & Co., the following names appear, Werle & Co., successors Veuve Clicquot Ponsardine, Rheims. Fenwick, Parrot & Co., agents.

Messrs. Fenwick, Parrot, & Co., caused the following entry to be inserted in the list of wine merchants in the London Directory: "Clicquot Ponsardine Veuve, 124, Fenchurch Street, E.C." Messrs. Fenwick, Parrot & Co. made a special payment on their own account to obtain the above insertion. Messrs. Fenwick, Parrot & Co. are duly taxed on all profits made by them, including their profits made as representatives of the appellants.

Messrs. Fenwick, Parrot & Co. seek for orders for the appellants' champagne in various parts of England. All orders for the appellants' wine are sought and taken for and on behalf of the appellants by Messrs. Fenwick, Parrot & Co., as their agents. The orders so obtained are transmitted by Messrs. Fenwick, Parrot & Co. direct to the appellants at Rheims, in the Republic of France. In response to the order so received the appellants forward the wine direct to the customer, and the goods are invoiced to him in the appellants' own name as vendors.

The purchasers pay the equivalent of the amount of the invoice in English money or by bill in Paris in French money to Messrs. Fenwick, Parrot & Co., at 124, Fenchurch Street, and Messrs. Fenwick, Parrot & Co. at once remit the amount to the appellants, or the amount is remitted by the purchaser direct to the appellants at Rheims. If paid to Messrs. Fenwick, Parrot & Co., it is not carried to the credit of the appellants in any current account. Some amounts due in respect of the wine so

1888

WERLE & Co. v. COLQUHOUN.

sold are paid by bills of exchange drawn by the appellants on the purchasers, and forwarded by the appellants to Messrs. Fenwick, Parrot & Co., at 124, Fenchurch Street, in order that they may obtain the acceptance of the bills, which, when obtained, are then held on behalf of the appellants. The appellants send from Rheims formal receipts to the purchasers for all payments whether made direct or through Messrs. Fenwick, Parrot & Co.

The appellants take all gains and suffer all losses occasioned on the sale of any wine in England, and Messrs. Fenwick, Parrot & Co. have no interest in any such sale other than their agents' commission on each transaction. It has occasionally happened that purchasers have not paid for wine supplied by the appellants, and thereupon proceedings have been taken in the English Courts in the name of the appellants, and proof in bankruptcy has been made in their name against a bankrupt debtor.

The terms on sale are that all wine is sold as it is then stored in the appellants' cellars at Rheims. The cost of packing and forwarding the wine is paid by the buyer, who also pays the carriage and freight, and the wine is at his risk from the time it leaves the appellants' cellars.

The appellants keep a large stock of wine in Rheims for sale in any part of the world, but they keep no wine in England. It was contended on behalf of the appellants, on the facts above stated, that the appellants do not exercise or carry on any trade, employment, or vocation in England, and that as Messrs. Fenwick, Parrot & Co. had paid income tax on all their profits made by them, the appellants are not liable to be assessed to income tax; and, further, that the profits are made in France and not in England, and they claimed that on these grounds the assessment should be discharged. The commissioners were of opinion that the appeal ought not to be allowed, and decided accordingly.

The question for the opinion of the Court is whether, on the above facts, a trade, employment, or vocation is exercised within the United Kingdom which renders the appellants liable to be assessed for duties on profits under Schedule D. of the statute 16 & 17 Vict. c. 34.

The Queen's Bench Division confirmed the decision of the commissioners, and gave judgment in favour of the Crown.

1888. Mar. 13. On appeal:—

Cohen, Q.C., and *Hollams*, for the appellants. It is clear that the property passes and delivery is given at Rheims, and all that the appellants do in England is to make a contract. That is not enough to charge them. There are a number of things that go to make up trading, but here the appellants have no branch establishment, no office, no member of their firm, and no property in any wine in England. They trade with England and not to England. The case is distinguishable from *Pommery* v. *Apthorpe* (1), on which the Court below decided.

[They cited also *Tischler* v. *Apthorpe*. (2)]

Sir E. Clarke, S.G. (*A. V. Dicey*, with him), for the Crown. The appellants exercise a trade in the United Kingdom through their representatives, who are authorized to send out circulars as to price, terms of delivery, and credit, and to accept orders on their account. The case comes within the principle of *Erichsen* v. *Last*. (3)

Cohen, Q.C., in reply.

LORD ESHER, M.R. In this case the question is whether the appellants are assessable to income tax under the Income Tax Acts. A person may be assessable for and in respect of the annual profits or gains arising or accruing to him though not a subject of Her Majesty, and not resident within the United Kingdom, from any trade exercised in the United Kingdom. The only question left to us is whether a trade, employment, or vocation is exercised within the United Kingdom which renders the appellants liable to be assessed for duties on profits under Schedule D. of 16 & 17 Vict. c. 34. The question is not whether they have been assessed in proper form, or whether the right persons have been assessed in form. If there is a trade exercised in England by the appellants it is not disputed that they receive the profits of it. Therefore the question in this case is brought down to this, was there a trade carried on in England by the appellants in respect of this wine?

(1) 56 L. J. (Q. B. D.) 155. (2) 33 W. R. 548; 52 L. T. (N.S.) 814.
(3) 8 Q. B. D. 414.

1888

WERLE & Co. v. COLQUHOUN.

Lord Esher, M.R.

I agree with the opinion expressed by the late Lord Chief Justice Cockburn in *Sulley* v. *Attorney-General* (1) that it is probably a question of fact where the trade is carried on. That question is divisible into two—is there a trade carried on, and, if so, is it carried on in England? If it is a question of fact in each case it will be impossible to make an exhaustive definition of what constitutes carrying on a trade. The question in each case must be whether the facts shewn to exist in that particular case establish that a trade is carried on, and that it is carried on in England. In this case the facts seem to me to be these. The appellants are wine growers and manufacturers in France, and have at Rheims a quantity of wine. Their trade is to do business in that wine, that is, to sell it. I have no doubt they carry on that trade at Rheims, but they desire to sell their wine in England. To do this they appoint an agent to act for them in England; they authorize him to send out circulars inviting orders; the price which they fix is put into those circulars, and, I think, they authorize him to put their name in the London Directory. If they do not, it is almost a necessary consequence of sending out the circulars that they should put their name in the London Directory, and I should say that if anyone authorizes that step the meaning is that he wants to do business in England. The agent is, if he can, to obtain orders for the purchase of the wine at the fixed price. It is suggested that he had no authority to receive these orders as contracts, but that all he could do was to forward them to Rheims for acceptance there. It seems to me that the inference is irresistible to the contrary. In almost every case the purchaser would require the wine in England. The appellants, by virtue of the contract made with their agent in London, undertake to select and despatch the wine to the address given them in England, though they stipulate that they will not pay the costs of packing and carriage, which is to be paid by the customers. Then in this case, although I do not think it necessary for the decision of the case, the inference is that the payments should be made to or through the London agents, and I have no doubt that a payment made in cash to them would be a good payment to the appellants. So if

(1) 5 H. & N. 711.

the payment is made by draft or acceptance those would in general go to the London agent, and again, I think, the proper inference is that that would be a receipt of the money by them. They did not always receive it, but, at all events, with regard to a part of the business they were entitled to receive payment, though I say again that, in my opinion, the question of whether the money was paid in England is not necessary to the decision of whether a trade is carried on in England, though it would be strong evidence that that was the case.

The primary object of a seller of wine is to obtain contracts for the sale of it. Here the order is the contract, and it is by carrying out that that they make their profit.

One way of testing whether this trade was carried on in England is that which I enunciated in *Erichsen* v. *Last* (1), that "wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad." It would have been better, instead of saying "such foreigners are exercising a profitable trade," to have said "a profitable trade is then exercised in England." I think that both the learned judges who heard that case expressed the same thing. Cotton, L.J., said: "When a person habitually does and contracts to do a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business;" and Jessel, M.R., said: "There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things;" and further, "the company habitually receive money in this country from English subjects for messages sent from England to places abroad, and they transmit those messages from stations in this country to places abroad. This, I think, makes it a carrying on of trade in this country." There is no reliance placed on the fact of there being an establishment in England, nor upon the fact of the money being received in England. If both these

(1) 8 Q. B. D. 414.

1888

WERLE & Co. v. COLQUHOUN.

Lord Esher, M.R.

facts exist, they are strong circumstances to shew that a trade is carried on in England, but their absence is not conclusive against this. Upon the authority of that case, if authority is required, but certainly on the facts of the present case, I have not a doubt that here there was a trade carried on in England, where the contracts were made. The making of contracts in such a case as the present is the whole substance and essence of the trade, and so the appellants exercise a business in England.

As to the other cases cited, I do not think it is necessary to elaborate them. It is said this case was decided in the Court below on the authority of *Pommery* v. *Apthorpe*. (1) I think that case was rightly decided. No doubt the facts were stronger in that case than in the one now before us; but that does not affect the sufficiency of the facts in the present case to lead us to the same conclusion.

Another point was raised: that if no one could be found to be assessed under s. 41 of 5 & 6 Vict. c. 35, as an agent or factor, that shewed that no such trade was carried on as was intended by the statute. As to that, I agree with the judgment of Mathew, J., in *Tischler* v. *Apthorpe* (2), that if the Crown can find such an agent as is described in s. 41, they can assess him; but, supposing they cannot, they must take such means as they are able to get at the person who should be assessed. Whether the right means have been taken to assess the appellants we are not asked, and that question is not before us; but I do not think that the right to assess is limited by s. 41, which is only machinery.

For these reasons I am of opinion that there was a trade exercised by the appellants in England, and as it is not denied that profits accrued from that trade, it does not signify where they accrued. Our judgment must, therefore, be for the Crown.

FRY, L.J. I am of the same opinion. The question arises under Schedule D. of the Income Tax Act, and we have to determine whether there is any trade exercised by the appellants within the United Kingdom from which it is admitted, if there be such a trade, the appellants receive profits. Now I shall not attempt anything like a definition of exercising a trade within

(1) 56 L. J. (Q. B. D.) 155. (2) 33 W. R. 548; 52 L. T. (N.S.) 814.

1888

WERLE & Co. v. COLQUHOUN.

Fry, L.J.

the United Kingdom. I think it is obvious that the late Master of the Rolls was correct when he said that whatever else those words may mean, they plainly included carrying on a trade, and I also entirely agree in his observation that the question whether a trade is carried on is not a matter of law, or one in respect of which you can lay down any one distinguishing incident, but it is a compound fact made up of a variety of things. In many cases it is obvious there would be no difficulty in determining whether a trade had been carried on at a particular place. A small shopkeeper who does nothing but sell particular wares that belong to himself in a shop, receiving payment for the wares he delivers in that shop, is plainly carrying on trade in the place where that shop is situated. The question, however, becomes much more difficult when the trade is carried on, as in the present case, in a far more complicated manner—when it is carried on by the intervention of agents, and when contracts may be made in one place, the goods may be in another, the principal in another, and the goods may be delivered in some other place. We have, however, simply to take all the relevant facts, and the mode in which the business is carried on, and to ask ourselves whether or not that business be or be not carried on within the United Kingdom. It appears to me that the same business may in some sense be carried on in many places. The head office of a firm, the place where the goods are manufactured, the place where the contracts are made, may all of them be places in which the business or parts of the business is or are carried on. Now in the present case what we find is this, that the appellants reside in France, carrying on there the business of vineyard proprietors, champagne makers and champagne merchants. No doubt a large portion of that business is carried on within France, but a portion of that business is that of champagne merchants. Now that means, as I understand, the selling of champagne, and that business they carry into effect in England through the intervention of a firm of agents in this country. They do not make merely an occasional contract through these agents, but they are in the habit of making contracts through them. Those contracts are so made in England. Now, pausing there, it appears to me that a most important part, perhaps the

1888

WERLE & Co. v. COLQUHOUN.

Fry, L.J.

most essential part, of the business of a champagne merchant was exercised by the appellants through the intervention of their agents within the United Kingdom. But the matter does not stop there, because, without saying what circumstances are material, I propose to consider all the circumstances which can in any way be material. The payments are made by the English purchasers to the agents of the appellants and are made in England, and I conceive receipts are given in England, as the results of those contracts which are entered into in this country. Then, through the intervention of the French carrying agents, the goods are sent by the appellants to England and the actual receipt of the goods by the purchasers is in England. I am not saying that there is not a delivery in a certain sense, to those who may be the agents of the purchasers in France. Whether the carrying agent in France is selected by the purchaser in England, or is selected by the vendor in France is a matter upon which we have no information and upon which I cannot therefore speculate, but which may be very material in considering whether the delivery is in France or in England. Then we find further, that these agents, with the authority of the appellants, issued advertisements and circulars in England for the purpose of causing contracts to be entered into in England. We find that the appellants' name is exhibited on the window or door opening on to the staircase of the office of their agents in London, where their names are entered as principals, and the names of the agents as agents, and we find further that their names are entered in the London Directory, an act which, I think, must be deemed to have been done by the agents with their authority. Now, putting all these facts together, and, I repeat, without attempting to determine which of them are essential, if any are, I have come to the conclusion that it is true to say that a business or a trade is exercised in the selling of champagne within the United Kingdom, whether by the appellants or anybody else I do not care to inquire, and from that business so exercised the appellants admit that they derive profits.

But then it was argued by Mr. Cohen that we cannot determine the question simply by the language of Schedule D. He has said that the machinery afforded by s. 41 shews that the

person not resident in the United Kingdom who derives profits from a business exercised within the United Kingdom is only to be chargeable in the event of his having a factor, agent or receiver having the receipt of any profit or gains within the United Kingdom. He says Messrs. Werle & Co. have no such factor, agent, or receiver, and therefore he asks us to hold that they are not chargeable. Now I agree with the Master of the Rolls in the view he takes of this section. I do not think it limits the generality of Schedule D. I think it gives machinery in particular cases—machinery to be applied where it can be applied; but farther than that, I do not agree with the minor proposition in Mr. Cohen's argument, because in the present case the appellants have an agent or agents residing within the United Kingdom, who, according to my conclusion from the facts, had the receipt of profits and gains, not, it is true, after they have been ascertained as such by the deduction from the gross income of the expenses and outgoings, but as a part of the gross sum which is paid to them. It is obvious, that whatever profits and gains there may be from the business exercised within this country, they must be part of the sums which are received by the agents, and I think they are not the less in receipt of profits and gains because they are in receipt of something else as well. I think the argument upon that point does not support the contention of the appellants, and I agree with the Master of the Rolls in what he has said upon it.

LOPES, L.J. The question is whether the appellants are assessable to income tax. Having regard to the words of the statute, Schedule D., the question resolves itself into this: whether the appellants receive profits arising from a trade exercised in this country. Now this is a question of fact, and it depends upon the particular circumstances of the case, and in considering those facts, I ask myself, where do these profits arise unless they arise from a trade exercised in this country? The contracts are made in this country; the wines are supplied here to English customers, and are paid for by English customers to a person who is authorized by the appellants to receive payment and to receive it in England. Can it be said the trade is exer-

1888

WERLE & Co. v. COLQUHOUN.

Lopes, L.J.

cised in France? It appears to me that would be impossible. There is no sale in France and there are no contracts made in France; there is no receipt of money in France. It appears to me the profits are earned in England in respect of goods ordered in England, sent to England and paid for in England by English customers. I think, therefore, the profits in question arise from a trade exercised in England and are assessable.

I wish to add that I entirely agree in what was said by the Master of the Rolls, namely, that there may be profits arising from a trade exercised in England without there being any establishment in this country.

With regard to ss. 41 and 44, I do not know that it is necessary to say anything, as we were not asked any question with regard to them, but they were used by Mr. Cohen in his argument, and I have only to say that I entirely agree with what was said by Mr. Justice Mathew in the interpretation he put upon those sections.

Appeal dismissed.

Solicitors for appellants: *Hollams, Son & Coward.*
Solicitor for Crown: *The Solicitor of Inland Revenue.*

A. M.

[IN THE COURT OF APPEAL.]

March 27, 28.

ANLABY AND OTHERS *v.* PRÆTORIUS.

Practice—Defence, Time for delivery of—Specially indorsed Writ—Irregular Judgment, setting aside—Power to impose Terms on Defendant—Orders III., *r.* 6; XX., *r.* 1; XXI. *rr.* 6, 7; LXX. *r.* 1.

The service of a writ specially indorsed under Order III., r. 6, is delivery of a statement of claim to the defendant within the meaning of Order XXI., r. 6; so that the defendant has ten days from the time limited for appearance within which to deliver his defence.

Where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiæ to have such judgment set aside; and the Court has only power to impose terms upon him as a condition of giving him his costs.

So *held* by Fry and Lopes, L.JJ., reversing the decision of the Queen's Bench Division.

APPEAL from the Queen's Bench Division.

Action to recover 67*l.*, money lent by the plaintiffs to the

defendant. The writ was specially indorsed, under Order III., rule 6, in the usual form. The indorsement was headed "Statement of Claim" and named the place of trial, and was signed by the plaintiffs' solicitors.

The writ was issued on January 14, and served on January 21, and the defendant entered an appearance on January 26. On February 7 the plaintiffs entered judgment on the ground that the defendant had not delivered his statement of defence within the prescribed time. The defendant delivered statement of defence on February 7, after judgment had been entered, but the plaintiffs refused to accept it. On February 9 the defendant took out a summons to set aside the judgment, and asking that the costs should be paid by the plaintiffs. The master dismissed that summons with costs, and the defendant's appeal to Hawkins, J., at chambers, was also dismissed with costs. The defendant then appealed to the Divisional Court (Huddleston, B., and Manisty, J.), who ordered that the judgment entered and execution (if any) issued should be set aside if the sum of 34*l.* was paid into court within four days, and that the costs should be costs in the cause, but that the appeal should be dismissed with costs if the money was not so paid into court. The defendant paid that sum into court and appealed, asking that the judgment should be set aside, and that the costs of the application should be paid by the plaintiffs.

J. G. Witt, for the appellant. The judgment entered by the plaintiffs was premature and irregular. The special indorsement on the writ was a statement of claim within the meaning of Order XXI., r. 6, and the defendant had therefore ten days from the delivery thereof, or from the time limited for appearance, whichever should last happen, within which to deliver his defence. The last day for appearance was January 28, so that the entry of judgment on February 7 was within the ten days, and therefore wrongful. By Order XX., r. 1, where a writ is specially indorsed under Order III., r. 6, "no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim." So also by Order XXVIII., r. 1, "the plaintiff may, without any leave, amend his statement

1888

ANLABY v. PRÆTORIUS.

of claim, whether indorsed on the writ or not," under certain specified conditions; and in App. C., s. iv., under the heading "Statements of Claim," forms of statements of claim which may be specially indorsed on the writ, under Order III., r. 6, are given. It is clear, therefore, that for the purpose of determining the time for delivery of the defence, the service of the writ was delivery of a statement of claim to the defendant. The judgment having been wrongfully obtained the defendant is entitled to have it set aside ex debito justitiæ, and the Court below had no power to impose terms upon him as a condition of setting it aside.

[He referred to *Veale* v. *Automatic Boiler Feeder Company.* (1)]

Israel Davis, for the respondents. A writ specially indorsed under Order III., r. 6, is not a statement of claim within the meaning of Order XXI., r. 6. The special indorsement is only in lieu of a statement of claim, and the defendant cannot require delivery of a statement of claim where the writ is so specially indorsed. A writ so indorsed has always, in practice, been treated as a writ and not as a pleading. It may be served on the defendant at any time, and is not affected by the rules which regulate the delivery of pleadings: *Murray* v. *Stephenson.* (2) It is submitted, therefore, that this case properly comes within Order XXI., r. 7, which provides that where the defendant has neither received nor required delivery of a statement of claim he must deliver his defence within ten days after his appearance, which period in the present case expired on February 5. The judgment was therefore properly obtained on February 10.

Next, if the entry of judgment was wrong, the Court below had power to set it aside on terms under Order LXX., r. 1, and having exercised their discretion, this Court ought not to interfere; and the cases shew that, if the defendant is entitled ex debito justitiæ to have the judgment set aside, the Court has power to impose terms because by his summons he asked to have it set aside with costs: *Abbott* v. *Greenwood* (3); *Bartlett* v. *Stinton* (4); *Pearce* v. *Chaplin.* (5)

(1) 18 Q. B. D. 631.
(2) 19 Q. B. D. 60.
(3) 7 Dowl. 534.
(4) Law Rep. 1 C. P. 483.
(5) 9 Q. B. 802.

Further, the defendant has acted upon the order of the Court below by paying the 34*l.* into court, and is therefore precluded from questioning that order. He might have allowed execution to issue, and then brought his action for trespass.

J. G. Witt, in reply, was asked to confine his argument to the effect of Order LXX., r. 1.

A wrongful entry of judgment is not within Order LXX., r. 1., which only applies where the parties have made some slip or blunder in their proceedings, and the party making it comes to ask the favour of the Court. Here the Court below ordered the defendant to pay money into court on the erroneous view that the judgment was regular, and the defendant must ask as an indulgence to have it set aside. The distinction between cases in which the plaintiff has obtained judgment improperly, and cases in which, though he was strictly entitled to enter judgment, the Court think that some relief should be given to the defendant, is pointed out in *Smith* v. *Sydney*. (1)

[He also referred to *Cash* v. *Wells*. (2)]

FRY, L.J. The most material question raised in this case is one of practice. The plaintiffs delivered to the defendant a writ, and indorsed upon it was what has been described, correctly I think, as a statement of claim. The indorsement states the nature of the claim and the amount claimed, and all the particulars which a statement of claim is required to give. The writ was issued on January 14 and served on the defendant on January 21, and the defendant entered an appearance on January 26. The question turns on Order XXI., rr. 6, 7, and on what was the earliest date upon which the plaintiff could enter judgment in default of delivery of the defence. Rule 6 is as follows: "Where a statement of claim is delivered to a defendant he shall deliver his defence within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a judge." Now the last day for appearance was the 28th, and judgment was entered on February 7. If, therefore, the time for delivery of defence ran from January 28, the entry of judgment was

(1) Law Rep. 5 Q. B. 203. (2) 1 B. & Ad. 375.

1888

ANLABY v. PRÆTORIUS.

Fry, L.J.

premature. Rule 7 provides that "a defendant who has appeared in an action, and who has neither received nor required the delivery of a statement of claim, must deliver his defence (if any) at any time within ten days after his appearance, unless such time is extended by the Court or a judge." We have, therefore, to consider whether a statement of claim was delivered in this case. If it was not, the time for delivering the defence ran from January 26, and the judgment was regular. I am of opinion that a statement of claim was delivered by the plaintiff when the writ was served on the defendant. Order XX., r. 1, I think, determines the point. It is: "Where the writ is specially indorsed under Order III., r. 6" (which was the case here), "no further statement of claim shall be delivered, but the indorsement on the writ shall be deemed to be the statement of claim." The words, "no further statement of claim shall be delivered," imply that the indorsement is a statement of claim, and the succeeding words make it still more clear by providing that the indorsement "shall be deemed to be the statement of claim." I am clearly of opinion that the indorsement on the writ was a statement of claim, and, therefore, that rule 6 of Order XXI. applied to the case. It follows that the defendant had ten days from the delivery of the statement of claim, or from the time limited for appearance, within which to deliver his defence; and as the writ was served on January 21, and the time limited for appearance was January 28, the last day for delivering the defence was ten days from January 28, and the judgment entered on February 7 was premature and irregular. In such a case the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon an obligation; the order to set aside the judgment is made ex debito justitiæ, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass. We were pressed with the argument that Order LXX., r. 1, gives a discretion to the Court which applies here. Rule 1 provides that "non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set

aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or a judge shall think fit." But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all. I do not think, therefore, that the case comes within r. 1, and we must consider what is the right practice without reference to that rule. There is a strong distinction between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the Court has a discretion to impose terms as a condition of granting the defendant relief. But although the Court is bound to set aside an irregular judgment ex debito justitiæ, it has always exercised a discretion as to costs, and has imposed terms as a condition of the exercise of that discretion—a common term being that the defendant shall not bring any action. It was contended that the discretion arises, not when the Court awards costs, but when it is asked to award them, and the language of Erle, C.J., in *Bartlett* v. *Stinton* (1) was relied on in support of that contention. It is to be observed that in that case the judge had made an order for costs in favour of the defendant upon the terms of his bringing no action, and the Chief Justice dwells upon that fact in his judgment. I do not think he meant to say that if an order for costs had been refused the judge could have imposed terms. In *Cash* v. *Wells* (2) the defendant had obtained a rule calling upon the plaintiff to shew cause why a judgment and subsequent proceedings thereon should not be set aside as against good faith, with costs, and the plaintiff asked the Court to impose as a condition upon the defendant, that he should not bring any action. The defendant refused to accept those terms. Bayley, J., said, "We cannot impose them without the defendant's consent. He applies to us ex debito justitiæ to have proceedings set aside which are against good faith. We are not compelled, however,

(1) Law Rep. 1 C. P. 483. (2) 1 B. & Ad. 375.

1888

ANLABY v. PRÆTORIUS.

FRY, L.J.

to give him the costs of his rule; and unless he will consent not to bring any action, we make this rule absolute without any costs." I think the true view is that where the Court gives costs there is power to impose terms on the defendant, but where costs, though asked for, are not given there is no such power.

It was further contended that the defendant had availed himself of the order of the Court below in this case, and therefore had precluded himself from appealing against that order. The action was brought for 67*l.* The defendant admitted that he owed 34*l.*, and the Court thereupon ordered him to pay that sum into court. He paid it in, and it is said that by so doing he acted upon the order of the Court, and cannot afterwards seek to set it aside. I do not think that that is a just conclusion to draw. He was in the predicament of being compelled to pay in the 34*l.*, or the judgment against him would stand. In paying it in he was acting under the compulsion of the order—not acceding to it.

The learned judges in the court below appear to have thought that it was unnecessary to decide the point of practice, and to have treated the case as though they had power to make a modified order which should meet the justice of the case. For the reasons I have given, I cannot assent to that view. I am of opinion that the appeal should be allowed.

LOPES, L.J. I am of the same opinion. The main question, which involves a somewhat important point of practice, is whether the case comes within r. 6 or within r. 7 of Order XXI.; in other words, whether the indorsement on the writ of summons is, or is not, a statement of claim. I think that Order XX., r. 1, decides that question. The words, "no further statement of claim shall be delivered," mean that that which has been delivered, namely, the writ specially indorsed under Order III., r. 6, is a statement of claim; and the words, "the indorsement on the writ shall be deemed to be the statement of claim," make the matter still clearer. I am, therefore, of opinion that a statement of claim was delivered within Order XXI., r. 6; and that the judgment entered by the plaintiff was premature and irregular.

I entirely agree that Order LXX., r. 1, does not apply here. It

1888

ANLABY v. PRÆTORIUS.

Lopes, L.J.

was meant to apply where a party had made some blunder in his proceedings, as by delivering a pleading too late; but the present case seems to me altogether outside the operation of r. 1, because the judgment was entered prematurely, without any right whatsoever. To obtain that judgment was a wrongful act, not an act done within any of the rules. The defendant is therefore entitled ex debito justitiæ to have it set aside. I cannot accede to the argument that the defendant is precluded from enforcing his right to have the judgment set aside because he has availed himself of the order of the Court by paying 34*l.* into court under that order. He paid in that sum because he could not help himself. As to costs, they are clearly within the discretion of the Court. The defendant is willing to allow the plaintiffs to take the 34*l.* out of court, and I think that he ought to have his costs. I entirely agree with the judgment of my brother Fry, and I am of opinion that the defendant is entitled to have the judgment set aside with costs.

Appeal allowed.

Solicitor for appellant: *Edward Betteley.*

Solicitors for the respondents: *Wilkinson & Dresser.*

W. A.

BETTS *v.* ARMSTEAD.

April 19.

Adulteration—Scienter—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.* c. 63), *s.* 6.

By s. 6 of the Sale of Food and Drugs Act, 1875, "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l.*":—

Held, that an offence within that section was committed, although the seller did not know that the article sold was not of the nature, substance, and quality demanded.

CASE stated by justices of the town of Nottingham under 42 & 43 Vict. c. 49.

The respondent sold to the prejudice of the purchaser a loaf containing a quantity of alum, and he was prosecuted therefor under s. 6 of the Sale of Food and Drugs Act, 1875. He stated in defence that he did not know that the bread contained alum,

1888

BETTS v. ARMSTEAD.

and that it must have been in the flour which he had bought. The justices believed that he did not know that the bread contained alum, and dismissed the complaint on that ground.

Stanger, for the appellant. In *Core* v. *James* (1), decided under 6 & 7 Wm. 4, c. 37, s. 8, the Court held that knowledge by the seller of the adulteration was essential to constitute an offence; but that case is no authority upon the construction of the Act now under consideration Sect. 6 says nothing about knowledge, and that this omission was intentional is shewn by the provisions of ss. 3, 4, and 5; s. 5 expressly provides that want of knowledge shall be a defence when a person is charged with an offence under s. 3 or s. 4. The provisions of s. 25 also shew that want of knowledge was not intended to be a defence unless the Act expressly said so.

[He referred to *Rook* v. *Hopley* (2); *Harris* v. *May* (3).]

The respondent did not appear.

CAVE, J. I am of opinion that the decision of the justices was wrong, and that the case must be remitted to them with that expression of our opinion. The respondent was summoned under s. 6 of the Food and Drugs Act, 1875, for selling bread containing alum to the prejudice of the purchaser. That section says that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality demanded by such purchaser, under a penalty not exceeding 20*l*." Now it was proved that the respondent had sold to the prejudice of the purchaser bread containing alum, and had consequently brought himself within the terms of s. 6. Those terms are not in any way qualified, but it was suggested that the justices ought to read into the section the word "knowingly," and they adopted that suggestion. That word is not to be found in the section, and it is clear from the words of other sections of the Act that the word "knowingly" was intentionally omitted from s. 6. It is provided by s. 5 that want of knowledge shall be a defence in the case of the offences specified in ss. 3

(1) Law Rep. 7 Q. B. 135. (2) 3 Ex. D. 209.
(3) 12 Q. B. D. 97.

and 4, and it is therefore obvious that the legislature, when it desired to make ignorance a good answer, has expressed that intention in the clearest terms. If the word "knowingly" ought to be imported into s. 6, it ought also to be imported into ss. 3 and 4, but to do so would make the provisions of s. 5 useless. The provisions of s. 25 also shew that the legislature did not intend the word "knowingly" to be read into the Act when not expressed. A case decided under a previous Act cannot be an authority upon this Act, the provisions of which are perfectly clear.

A. L. SMITH, J. I entirely agree with all that my brother Cave has said, and I desire to add but one observation:—In the case of offences under ss. 3 and 4, it is a defence to prove want of knowledge, and the penalty for a first offence is 50*l.*, while a second offence is made a misdemeanor, punishable with six months' hard labour. For offences under s. 6, however, the only punishment is a penalty of 20*l.* That also goes to shew that s. 6 intentionally says nothing about want of knowledge.

Case remitted accordingly.

Solicitors for appellant: *Sharpe, Parkers & Co., for S. G. Johnson, Nottingham.*

W. A.

LEE *v.* TURNER.
TYLER, CLAIMANT.

April 19.

Bill of Sale—Registration—Validity—Misdescription of Occupation of Grantor—Incorrect Name—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.

The grantor of a bill of sale was described in the bill of sale and in the affidavit filed upon registration as "Kendrick Turner, tutor," whereas, in fact, his name was Frederick Henry Turner, and he was a schoolmaster:—

Held, that the misdescription rendered the registration of the bill of sale void.

APPEAL from the County Court of Lambeth.

This was an interpleader issue to try the right to goods as between Tyler, who claimed them as grantee of a bill of sale from Turner, and Lee, who was the execution creditor of Turner. In

1888

LEE v. TURNER.

the bill of sale and in the affidavit filed on registration Turner was described as "Kendrick Turner, tutor," but it was proved at the trial of the issue that his true name was Frederick Henry Turner, and that he was a schoolmaster. The county court judge held that "Kendrick Turner, tutor," was not a correct description of "Frederick Henry Turner, schoolmaster," and that the registration of the bill of sale was therefore void. The claimant, Tyler, appealed.

H. Kisch, for the claimant. The fact that the Christian name of the grantor is incorrectly given is immaterial, and the description of the occupation of the grantor is sufficiently correct. At common law a man can validly grant or assign his property under any name he pleases, and there is nothing in the Bills of Sale Acts of 1878 and 1882 which says that the true name of the grantor must be given. Sect. 10, sub-s. 2, of the Act of 1878 only says that the affidavit must contain a description of the residence and occupation; s. 11, which deals with renewals of registration, only provides that the affidavit filed with the registrar shall state the "names" of the parties as stated in the bill of sale, and s. 12, with respect to the form of the register, provides for a purely ministerial act to be done by the registrar, who must enter the name as given in the bill of sale: *Needham* v. *Johnson* (1); s. 14 provides that a misstatement of a name may be rectified, but does not say that the true name must have been given in the first instance. In a case decided upon ss. 1 and 3 of the Act of 1854, which correspond with ss. 2 and 10 of the Act of 1878, Thesiger, L.J., says: "There is nothing in the Act which necessitates the name of the grantor being correctly given, that is, in regard to the validity of the registration": *Ex parte McHattie, In re Wood.* (2) The word "tutor" does sufficiently describe the occupation of the grantor, and no person could be misled by the description of him as tutor instead of as schoolmaster: *Briggs* v. *Boss.* (3)

[He also referred to *Ex parte Hill, In re Lane.* (4)]

C. J. Peile, for the execution creditor, was not heard.

(1) 15 W. R. 346.
(2) 10 Ch. D. 398, 406.
(3) Law Rep. 3 Q. B. 268.
(4) 17 Q. B. D. 74

1888

LEE v. TURNER.

CAVE, J. I am of opinion that this appeal must be dismissed. The case is an extremely clear one. A gentleman whose real name is Frederick Henry Turner gave a bill of sale in the name of Kendrick Turner, and in the bill of sale and in the affidavit filed upon registration he described himself as a tutor, when he was in fact a schoolmaster. Now there is a great difference between a tutor and a schoolmaster, and, therefore, the occupation of the grantor is incorrectly described. If his name had been correctly given, the other misdescription might, or might not, have been fatal; but the name was not correctly given, and, therefore, I think that the decision of the learned county court judge was right.

A. L. SMITH, J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *John Wills.*
Solicitors for respondent: *Barnard & Co.*

W. A.

DOWNS *v.* SALMON.
THE CONSOLIDATED CREDIT AND MORTGAGE CORPORATION, LIMITED, CLAIMANTS.

April 19, 24.

Bill of Sale—Registration—Validity—Misdescription of Grantor's Name—Intent to mislead—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.

In a bill of sale given by husband and wife, and in the affidavit filed on registration, the grantors' names were described as "Alfred Salmon and Edith Campbell Salmon, wife of Alfred Salmon." The husband's true name was George Henry Arthur Salmon, and the misdescriptions were purposely made by both the grantors in order to conceal the fact that they had given a bill of sale:—

Held, that the registration of the bill of sale was not thereby rendered invalid.

APPEAL from the decision of the deputy judge of the Lambeth County Court at the trial of an interpleader issue, directed to try the right to certain goods as between the Consolidated Credit and Mortgage Corporation, Limited, who claimed the goods as

1888

DOWNS v. SALMON.

grantees under a bill of sale, and W. W. Downs an execution creditor of the grantor.

The bill of sale was dated October 1, 1886, and was given by George Henry Arthur Salmon and Edith Campbell Salmon, his wife. In the bill of sale, and in the affidavit filed on registration thereof, the grantors were described as "Alfred Salmon and Edith Campbell, wife of Alfred Salmon."

From the evidence given by Mrs. Salmon at the trial it appeared that the misdescription was purposely made by the grantors because G. H. A. Salmon was applying for the situation of a clerk in the City, and it would be prejudicial to him if it were known that he had a bill of sale on his property. The deputy county court judge found as a fact "that the misdescription of the Christian name of the grantor, G. H. A. Salmon, was wilfully made by both the grantors with the object which appears in the evidence," but he also found that there was no evidence that the grantees were aware of the misdescription, nor that anyone was deceived by it; and, being of opinion that the case was governed by *Ex parte McHattie, In re Wood* (1), he held that the bill of sale was good.

The execution creditor appealed.

C. E. Jones, for the appellant. The misdescriptions by the grantors made the registration of the bill of sale bad. This case differs from *Ex parte McHattie, In re Wood* (2), because here the Christian name of the husband was wilfully misdescribed with the object of misleading persons who might search the register. In that case the bill of sale was executed by the grantor in his proper name of Joseph Wood, though he was generally known as Joseph Albert Wood; and Baggallay, L.J., in his judgment said, "But the Bills of Sale Act does not require that the name of the grantor should be given otherwise than by giving his real name." It is submitted that, the object of the Bills of Sale Acts being to enable persons who are asked to give the grantor credit to find out at once from the register whether he has given a bill of sale, those Acts imply that the name must be given with sufficient correctness to carry out that object. It may be inferred

(1) 10 Ch. D. 398, 406. (2) 10 Ch. D. 398.

from the judgment of Cockburn, C.J., in *Foulger* v. *Taylor* (1), that in his opinion the Act required the name of the grantor to be given. The form given in the Schedule to the Act of 1882, which runs, "This indenture, made etc. between A. B. of —— of the one part, and C. D. of —— of the other part," shews it was intended that the grantor's name should be given; and s. 14 of the Act of 1878 enables a judge of the High Court, on being satisfied that the misstatement of the name of any person was accidental or due to inadvertence, to rectify such misstatement. Sect. 10, sub-s. 2, of the Act of 1878 requires that the affidavit filed on registration shall contain "a description of the residence and occupation" of the person making or giving the bill of sale. It is contended that in the present case the description of Mrs. Salmon as "wife of Alfred Salmon" is a description of her occupation; and the description being wrong, the registration was bad: *Luckyn* v. *Hambyn*. (2) It is understood that a Divisional Court last week decided that the registration of a bill of sale was void because the grantor's Christian name was wrongly given (3).

Jelf, Q.C., and *W. H. Clay*, for the respondents, were not heard.

FIELD, J. This is a very plain case. There is no doubt that the grantors of this bill of sale, who were man and wife, committed a deliberate fraud upon the Bills of Sale Acts. They deliberately intended to deceive the public, their motive being that which was stated in evidence, namely, that the husband was applying for a situation in the City, and it would prejudice his chance of success if it were known that he had given a bill of sale. It is not, however, alleged that the execution creditor was misled by the misdescription, or that he did not know that the description of the names of the grantors was incorrect. The only objections to the bill of sale taken before the deputy county court judge were, first, that the Christian name of the husband was incorrectly given as "Alfred," whereas his true Christian names were "George Henry Arthur," and secondly, that his wife was described as "wife of Alfred Salmon," being the same incorrect description of

(1) 1 L. T. (N.S.) 57. (2) 18 W. R. 43.

(3) See *Lee* v. *Turner* (*ante*, p. 773).

1888

DOWNS v. SALMON.

Field, J.

the husband's Christian name. The bill of sale was not impeached in respect of being in itself a bad bill of sale, but in respect of not having been duly registered under the clauses of the statutes relating to registration. We have, therefore, only to see whether it is brought within the disabling provisions of those clauses. At common law admittedly the bill of sale would be good, but non-compliance with the requirements of s. 10, sub-s. 2, of the Act of 1878 would render the registration bad, and would therefore, under s. 8 of the Act of 1882, render the bill of sale void in respect of the personal chattels comprised therein. Sect. 10, sub-s. 2, requires that the bill of sale and a true copy of it and of every attestation of the execution of it, "together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same," shall be filed with the registrar within seven days after the making of the bill of sale. The provision which requires that the affidavit shall state the due execution and attestation of the bill of sale might mean that the affidavit must state that the instrument was duly executed by the person who in the terms of it professed to be the grantor, but I think it would be giving too broad a construction if we held that that provision meant to include a correct statement of the grantor's Christian name. The affidavit must also give a "description of the residence and occupation" of the grantor. I am clearly of opinion that the description of Mrs. Salmon as the "wife of Alfred Salmon" was not a description of her occupation. As to the misdescription of the husband's Christian name, all the judges of the Court of Appeal in the case of *Ex parte McHattie, In re Wood* (1), relied on the fact that the Bills of Sale Act, 1854, which was in question there, did not require the names of the grantor to be stated. Neither do the Bills of Sale Acts, 1878 and 1882. I am of opinion, therefore, that the decision of the deputy county court judge was right.

WILLS, J. I am of the same opinion. This clearly would be a good bill of sale at common law: the only question for us is

(1) 10 Ch. D. 398.

whether there is any statutory provision which makes it void. Now there is nothing in the Bills of Sale Acts, 1878 and 1882, which deals with a misdescription of the grantor's name. The form of a bill of sale given in the schedule to the Act of 1882 only sets forth that the bill of sale is made "between A. B. of &c. of the one part, and C. D. of &c. of the other part." There is nothing about the correct names nor about the descriptions of the parties. It is said that the description of Mrs. Salmon's occupation was wrong. I am of opinion that the description of her as "wife of Alfred Salmon" was not a description of her occupation at all, and if in fact, as was the case here, she had no occupation, the affidavit is not defective for want of a description of that which does not exist. The case of *Luckin* v. *Hambyn* (1) was relied on as shewing that the description of a woman as "widow" was a description of her occupation. But that is not the decision. She was executrix of a farmer, and as such was carrying on his business for a time, and she had described herself as "widow" instead of "farmer." The Court decided that, farming being a temporary occupation outside her ordinary way of life, it was not necessary that she should describe herself as a farmer. In the present case, there being nothing in the statutes to hit the blot, I am of opinion that the registration of the bill of sale is not avoided by the misdescription relied on by the execution creditor. The appeal must be dismissed with costs.

Appeal dismissed. Leave to appeal was refused.

Solicitors for appellants: *R. B. Wheatley & Son.*
Solicitors for respondent: *Vanderpump & Eve.*

(1) 18 W. R. 43.

W. A.

1888

April 18.

LEWIS *v.* GRAHAM.

*Mayor's Court—Jurisdiction—Prohibition—*20 & 21 *Vict. c. clvii. s.* 12— "*Carry on Business*"*—Solicitor's Clerk.*

A clerk employed by a solicitor at offices in the city of London does not "carry on business" there within the meaning of the Mayor's Court Extension Act, 1857 (20 & 21 Vict. c. clvii.), s. 12, so as to be subject to the jurisdiction of the Mayor's Court.

APPLICATION referred by Denman, J., from chambers to the Court for a writ of prohibition to the Lord Mayor's Court in an action of trespass.

The trespass was alleged to have been committed at Lewisham in Kent, and the damages claimed did not exceed 50*l*. The defendant lived at Lewisham, but was a clerk employed by a solicitor at his offices in the City.

L. Glyn, for the defendant. The Mayor's Court has no jurisdiction. The defendant, although employed by a person in business in the City, does not himself "carry on business" there within the meaning of the Mayor's Court Act (20 & 21 Vict. c. clvii.), s. 12.

In *Buckley* v. *Hann* (1) the Court of Exchequer held that a clerk employed at the Admiralty Office did not "carry on his business" within the jurisdiction of the London Small Debts Act (10 & 11 Vict. c. lxxi.); and in *Sangster* v. *Kay* (2) the Court held, on the identical words of the 9 & 10 Vict. c. 95, the County Court Act, 1846, s. 128, that a clerk in the Privy Council Office did not "carry on his business" there. The words of those Acts are substantially the same as the words in the Mayor's Court Extension Act, 1857, which should receive the same construction: *Le Tailleur* v. *South Eastern Ry. Co.* (3) The plaintiff relied on *Ex parte Breull, In re Bowie* (4), in which the Lords Justices in the Chancery Division held that a debtor who was a clerk in a bank within the district of the London Bankruptcy Court did, within s. 17 of the Bankruptcy Rules, 1870, "carry on business"

(1) 5 Ex. 43.
(2) 5 Ex. 386.
(3) 3 C. P. D. 18.
(4) 16 Ch. D. 484.

within that district. But that was a decision on a Bankruptcy rule, and is no authority on the Mayor's Court Act; and, moreover, *Buckley* v. *Hann* (1) and *Sangster* v. *Kay* (2) were not cited.

Probyn, for the plaintiff. There is a conflict of decisions, but the latest, and that of a Court of Appeal, is *Ex parte Breull, In re Bowie* (3), and is in favour of the plaintiff. The object of the provision in the Mayor's Court Act, and of the Bankruptcy rule are identical, viz., that legal proceedings against a man should be in the forum most convenient to him. In *Ex parte Breull, In re Bowie* (3), James, L.J., said of the debtor, "His business in life is that of a bank clerk, and it is not the less his business because he receives a fixed salary for it. He is really and truly for all commercial purposes, carrying on business in the city of London." (4) That observation is equally applicable to a solicitor's clerk, and is made on the words in question, viz. "carry on business," whereas the decisions in *Buckley* v. *Hann* (1) and *Sangster* v. *Kay* (2) were upon the words "carry on his business," which are materially different. [He also referred to *Dunston* v. *Paterson*. (5)]

LORD COLERIDGE, C.J. I am of opinion that a prohibition must issue. 20 & 21 Vict. c. clvii., s. 12, enacts that "where the debt or damage claimed in any action shall not exceed the sum of 50*l*., no plea to the jurisdiction shall be allowed, provided the defendant or one of the defendants shall dwell or carry on business within the city of London or the liberties thereof. . . ."

In construing those words we must regard the intention of the legislature, and see whether, according to good sense, the defendant did "carry on business" in the city of London within the meaning of the section. I agree with the observation of James, L.J., in *Ex parte Breull, In re Bowie* (6) that "residence" and "business" are elastic words, of which an exhaustive definition cannot be given, but they must be construed in every case in accordance with the object and intent of the Act in which they occur.

If the question in this case were res integra I should say

(1) 5 Ex. 43.
(2) 5 Ex. 386.
(3) 16 Ch. D. 484.
(4) Page 487.
(5) 5 C. B. (N.S.) 267.
(6) 16 Ch. D. 484, at p. 487.

1888

LEWIS v. GRAHAM.

Lord Coleridge, C.J.

that it was only where a person is employed in business of his own, carrying on business in the ordinary sense of the words, that the Mayor's Court has jurisdiction, and that it would extend the jurisdiction far beyond what is reasonable if, in every case where a person happens to be employed in any situation, high or low, in the offices or warehouses of persons who carry on business in the city of London, he was held to be carrying on business in the City. In a certain sense the defendant was carrying on business, because he was employed in the City, and if the words "carry on business" must be held to extend to every kind of employment the argument of his learned counsel is wrong. But that is not a fair interpretation of the words. The business must be some business in which he has control, or acts as one of the partners engaged in carrying it on. A particular clerk or workman who is engaged about the business, but has no control over it whatever, cannot be said to be carrying on business in the City. That would be my opinion if the matter were new. But it is not new. There are two cases in the Court of Exchequer in which the questions were as to the jurisdiction of an inferior Court. It was contended in one of those cases that a clerk in the Admiralty, and in the other that a clerk in the Privy Council carried on business within the jurisdiction. In both cases the Court held that the clerk did not "carry on his business" for the purposes of the respective Acts within the jurisdiction, because he was a mere servant employed in a department of the State. Those cases would be directly in point except for the word "his" in the Acts on which they arose. But I think that word makes no difference, because the words "carry on business" must mean carry on his business. I agree that if the matter had been present to the mind of James, L.J., he would doubtless have said that for the purpose of the decision in *Ex parte Bruell, In re Bowie* (1), the words "carry on business" were the same whether applied to a clerk in the Admiralty, Privy Council, or a bank. He applied it to a clerk in a bank, and had not the two other cases before him. But those two cases appear to be directly in point, and further, there are cases with respect to railway companies in which it has been held that, although they

(1) 16 Ch. D. 484.

have offices and carry on a large part of their business inside London, they were not within this very Act. We are aware that there are Acts which say that for certain purposes companies are to be dealt with as carrying on business at their head offices only, but the decisions to which I refer are not put on that ground, but on the ground that railway companies with a number of offices for distinct purposes in the country do not "carry on business" within the County Courts Acts, or similar Acts, in every one of those places in which part of their business is, in a certain sense, carried on by some one. Those cases seem to rest on the authority of the two cases in the Exchequer. If the decision in the Court of Appeal had been on this Act and these words, of course it would have been my duty to submit to the judgment of that Court, and I should have done so. But the Court of Appeal was dealing with a different state of things, and Act, or rules equivalent to an Act. It was dealing with a case where the Court in respect of which the question arose was one of unlimited jurisdiction, and with the question how the rules which distributed the business of the Court were to be construed, and, undoubtedly there are expressions in the judgment which (taken apart from the subject-matter, and without regard to the point of the decision, viz., the unlimited jurisdiction of the Court) would be much in favour of the plaintiff. But the answer to that case is that it was decided on a different state of things, where it was a mere question of the distribution of business, and not one of jurisdiction. Moreover, the Court of Appeal, in deciding that question, had not before them the two distinct authorities in the Court of Exchequer which ought to be treated, and no doubt would be treated, with great respect in any Court. The Court of Appeal pointedly abstained from overruling the cases cited to them on the County Court Acts respecting railway companies, saying that those cases had no application to the question before them. The result is that my construction of the enactment, if the question were new, would be in favour of the defendant; that there is a series of authorities on words either the same as or indistinguishable from those on which we have to decide; and the only decision in favour of the plaintiff is a case, no doubt of great authority, but distinguish-

1888

LEWIS v. GRAHAM.

able from the present on broad and intelligible grounds. I think, therefore, a prohibition must go.

MATHEW, J. I am of the same opinion. If our decision were in favour of the plaintiff the jurisdiction of the Mayor's Court would be very widely extended, for a great number of those who deal in the City dwell outside it, and the learned counsel for the plaintiff must contend that everyone might be sued in the Mayor's Court for a cause of action arising at his home outside the City. The question is, therefore, one of general importance. On first reading the words "provided the defendant . . . shall dwell or carry on business within the city of London . . ." nobody would suppose that the legislature had contemplated, when passing the Act, that a clerk would be included in the ordinary meaning of the words persons carrying on business—as a shopkeeper or a merchant would be. But our attention was called to an authority in the Court of Appeal, and if it amounted to a decision on this Act, we must follow it. As against that decision, however, we have two decisions of the Court of Exchequer, which appear to have been acted on for many years, and to be exactly in point,—for I agree that the distinction which the learned counsel for the plaintiff tried to make from the word "his" being used in one Act, and not in the other, is not valid. The Mayor's Court Act means "provided the defendant shall carry on 'his' business"—not the business of another. Can it be said that in serving his master in the City, a clerk carries on "his" business there? I think the words "carry on" apply to much more than mere service. The business of the plaintiff is not even carried on in any fixed place, because it is the business of a solicitor's clerk to carry on business wherever he is instructed to do it. It appears to me that the Act does not apply under these circumstances.

Order for prohibition.

Solicitors for plaintiff: *Hare & Hood.*

Solicitors for defendant: *Groom & Sons.*

J. R.

MONETARY ADVANCE COMPANY *v.* CATER. 1888 *April* 16.

Bill of Sale—Promissory Note, Validity of, where given as Security for Sums secured by void Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

The defendant gave the plaintiffs a bill of sale of personal chattels to secure the repayment of a sum of money and interest; and at the same time, and as part of the same transaction, gave them his promissory note for the payment of the same sum and interest by instalments of the same amounts, and to be paid on the same days, as provided by the bill of sale. The promissory note also stipulated that in the event of any of the instalments falling into arrear the whole amount outstanding should immediately become due and payable. In an action on the promissory note:—

Held that, though the stipulation in the promissory note rendered the bill of sale void, the promissory note was good, and the plaintiffs were entitled to recover.

MOTION by way of appeal from a decision of the judge of the Edmonton County Court.

The action was brought to recover 31*l.* 9*s.*, the balance of principal and interest alleged to be due from the defendant to the plaintiffs on a promissory note.

It appeared from the judge's notes that on February 18, 1886, the plaintiffs lent to the defendant 30*l.* upon the security of a bill of sale of his furniture and effects given by the defendant. The plaintiffs at the same time took from the defendant a promissory note for the repayment of 30*l.* with interest, payable by instalments on the same days and of the same amounts as provided by the bill of sale. The promissory note also contained a stipulation that in the event of any of the instalments falling into arrear, then the whole amount outstanding on the promissory note should immediately become due and payable.

The county court judge was of opinion that the bill of sale and the promissory note were given as one and the same transaction, and formed one contract between the parties, and held that, as by the effect of the decision in *Counsell* v. *London and Westminster Loan and Discount Co.* (1) the registration of the bill of sale was rendered invalid by the promissory note, which operated as a

(1) 19 Q. B. D. 512.

1888

MONETARY ADVANCE COMPANY v. CATER.

defeasance, and ought to have been contained in the bill of sale, that promissory note was also invalid.

The plaintiffs appealed.

W. H. Clay, for the plaintiffs. This promissory note is good. The learned county court judge was wrong in thinking that the decision in *Counsell* v. *London and Westminster Loan and Discount Co.* (1) applied to make it void. The promissory note does not deal with or affect the personal chattels comprised in the bill of sale, and forms no part of that bill of sale which the Bills of Sale Act, 1882, s. 9, says shall be void if not in accordance with the form in the schedule. The distinction is shewn by the judgment in *Davies* v. *Rees* (2), in which case the Court of Appeal held that, where a bill of sale was void because not in accordance with the form in the schedule, the covenant to pay principal and interest contained in the bill of sale was also void, because the form contained such a covenant. The decision in *In re Burdett, Ex parte Byrne* (3), has the same effect.

[He was stopped.]

L. Probyn, for the defendant. The county court judge's decision was right. He found as a fact that the bill of sale and promissory note formed one and the same transaction, and that the note was not given as a collateral security. That is the true view of the effect of the two documents. They must be read together and treated as constituting one contract: *Simpson* v. *Charing Cross Bank*. (4) The promise to pay would clearly be bad if it were contained in the bill of sale; and the accident of its being written on another piece of paper makes no difference.

CAVE, J. I am of opinion that this appeal should be allowed. I find it difficult to understand the grounds upon which it is said that the promissory note ought to be held bad. Primâ facie the agreement of the parties evidenced by the promissory note is perfectly good, and binds the defendant. He seeks to get out of his liability by saying, "I also gave a bill of sale as security for the payment of the same sum of money; that bill of sale is bad, and therefore I am not liable on my promise to pay contained in

(1) 19 Q. B. D. 512.
(2) 17 Q. B. D. 408.
(3) 20 Q. B. D. 310.
(4) 34 W. R. 568.

1888

MONETARY ADVANCE COMPANY v. CATER.

Cave, J.

the note." I cannot see why he should not be liable. In *Davies* v. *Rees* (1) it was held that, where a covenant to pay the principal and interest thereby secured was contained in a bill of sale which was void as not being in accordance with the form in the schedule to the Act, the covenant to pay the principal and interest was also rendered void, because s. 9 provides that the bill of sale shall be void unless made in accordance with the form in the schedule, which form contains a covenant to pay principal and interest, and it was, said the Court, impossible to say that the covenant to pay the mortgage money and interest was not part of the bill of sale spoken of in the Act. But the very care and elaboration employed in that case in order to make out that the provision to pay principal and interest was contained in that part of the bill of sale which the Act declared void if not made in accordance with the form in the schedule clearly indicate that, where the promise to pay is contained in a collateral document, the view that the promise to pay is void as forming an integral portion of the bill of sale no longer applies. In the present case the promise to pay is contained in another document which gives the grantee no right in respect of the personal chattels included in the bill of sale. No statute enacts that the promissory note shall be void, and the defendant cannot say, as in *Davies* v. *Rees* (1) that it is an integral part of that bill of sale which the Bills of Sale Act declares void.

I am of opinion, therefore, that the learned county court judge was mistaken in his view.

A. L. SMITH, J. I am of the same opinion. The learned county court judge adopted, as the reasons for his decision, part of the statement of the Master of the Rolls in *Counsell* v. *London and Westminster Loan and Discount Co.* (2) to the effect that, having regard to the identity of the figures and dates in the two documents in question, and to the fact that they both related to the same transaction, there was but one contract between the parties contained both in the bill of sale and the promissory note. But the real ratio decidendi in that case was that the promissory note operated as a defeasance of the bill of sale; that

(1) 17 Q. B. D. 408. (2) 19 Q. B. D. 512.

1888

MONETARY ADVANCE COMPANY v. CATER.

A. L. Smith, J.

by payment of the promissory note the bill of sale would be defeated, and would no longer be available as a security against the grantor. The bill of sale was held bad because the condition for defeasance was not contained in it. It is argued, in the present case, that the promissory note is bad because the bill of sale and the promissory note are the same document, and the bill of sale is bad. But they are not the same document, though they record one transaction. They would require different stamps, and could not together be stamped with one stamp as either a bill of sale or a promissory note. There is no statutory provision that a promissory note for payment of the sums secured by the bill of sale shall be void. I am of opinion, therefore, that the plaintiffs are entitled to recover the full amount claimed.

Appeal allowed.

Solicitors for plaintiffs: *Rogers, Harrison & Co.*
Solicitors for defendant: *Morris, Allens & Chapman.*

W. A.

April 11.

FARMER AND OTHERS, OVERSEERS OF THE POOR OF THE TOWNSHIP OF SALFORD *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Poor-rate — Borough-rate — County-rate — Deficiency in Assessment to Poor-rate—Liability of Promoters of Undertaking—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 133—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50, *s.* 145, *sub-s.* 1—15 & 16 *Vict. c.* 81, *s.* 26, *and Schedule—Union Chargeability Act*, 1865 (28 & 29 *Vict. c.* 79), *s.* 11—*Consolidated Order Amendment Order of Poor Law Board, Feb.* 26, 1866.

By s. 133 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), the promoters of the undertaking are to make good the deficiency in the assessment for poor-rate arising from their being in possession of lands liable to be assessed thereto :—

Held that, the borough-rate (under 45 & 46 Vict. c. 50, s. 145) and the county-rate (under 15 & 16 Vict. c. 81, s. 26) being respectively made chargeable on the poor-rate, the deficiency in the assessment for the poor-rate, which the promoters of the undertaking are liable to make good, includes any deficiency in respect of amounts raised for borough-rate and county-rate, as well as any deficiency in the assessment for poor-law purposes properly so called.

SPECIAL CASE stated by consent.

The action was brought by the overseers of the poor of the township of Salford to recover from the London and North

Western Railway Company as promoters of an undertaking by virtue of an Act with which the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), was incorporated, the sum of 951*l.* 16*s.* 3*d.* as "deficiency in the assessment for poor's-rate" within the township within the meaning of s. 133 of the Act, occasioned by the company being in possession for the purpose of their works of lands in the township of the rateable value of 4960*l.*

By s. 133 of the Lands Clauses Consolidation Act, 1845, "If the promoters of the undertaking become possessed by virtue of this or the special Act or any Act incorporated therewith of any lands charged with land tax or liable to be assessed to the poor's-rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor's-rate, be liable to make good the deficiency in the several assessments for land tax and poor's-rate by reason of such land having been taken or used for the purposes of the works."

The township of Salford, in which the works were, is wholly within the borough of Salford and in the county of Lancaster. The deficiency was alleged to arise in respect of a "poor-rate" of 3*s.* 10*d.* in the pound made on March 31, 1886, of which the particulars in the demand note were: "poor-rate" 1*s.* 6¼*d.*, "borough-rate" 2*s.* 0½*d.*, "county-rate" 3¼*d.* "Poor-rate" was charged in respect of the contribution of the township of Salford to the Salford Poor Law Union; "borough-rate" under a precept from the council of the borough of Salford directing the plaintiffs to pay such rate "out of the poor-rate;" "county-rate" under an order of the guardians of Salford Poor Law Union, acting on a precept of the clerk of the peace of the county of Lancaster, directing the plaintiffs to pay such rate "out of the poor-rate." The defendants paid into Court 377*l.* 12*s.* 9*d.* on account of "poor-rate," i.e., the contribution of the township to the Salford Poor Law Union, but contended that they were not liable to pay "borough-rate" 506*l.* 19*s.* 5*d.* (1), or "county-rate"

(1) By 7 Wm. 4 & 1 Vict. c. 81 (passed in 1837) when a "borough-rate" has been made the council of the borough may order the overseers of a parish or place within it either to pay the amount of the rate for which the parish or place is liable "out of the poor-rate," or to make a pound rate in respect of such rate.

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), these provisions are repealed, and by s. 145,

1888

FARMER v. LONDON AND NORTH WESTERN RAILWAY CO

67*l.* 4*s.* 1*d.* (1), as these rates were not "poor-rate" within the meaning of s. 133 of the Lands Clauses Consolidation Act, 1845.

Henn Collins, Q.C. (*Sutton*, with him), for the plaintiffs. The defendants are liable to pay both "borough-rate" and "county-rate." "Borough-rate" and "county-rate" are, equally with "poor-rate" proper, "poor-rate" the "deficiency in the assessment" for which the promoters of the undertaking are to make good. These rates are poor-rate by statute. By s. 145 of the Municipal Corporations Act, 1882, the council of a borough is empowered to "order the overseers to pay the contribution of

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sub-s. 1: "Where a parish is wholly in a borough the council may from time to time if they think fit order the overseers to pay the contribution of the parish to the borough-rate out of the poor-rate made or to be made for the parish."

(1) By 55 Geo. 3, c. 51, s. 12 (passed in 1816) when a county-rate has been made the justices are to issue a warrant to the high constable and the high constable is to issue warrants to the overseers for parishes or townships, directing them "to levy and pay such rate to the treasurer of the county," and the overseers are empowered to raise such sum "by an equal rate or assessment upon the property rateable to the poor within the parish or township."

By 15 & 16 Vict. c. 81 (passed in 1853), these provisions are repealed, and by s. 26, when a county-rate has been made, the justices "shall order precepts" in a statutory form to be issued to the guardians of every union of parishes "to cause the aggregate of the rate to be paid by them out of the money held by them on behalf of each parish to the treasurer of the county" and "such guardians shall raise the money required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor, and shall pay such moneys in the manner prescribed by such precepts."

By the form of precept in the schedule the guardians are required to pay the "county-rate" "from and out of the moneys paid into the hands of the treasurer of your union for the uses and purposes of the said union."

By the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 11, it is provided that the Poor Law Board shall make all such orders as may be requisite to render the provisions of the Act applicable to the proceedings and accounts of the guardians of unions and overseers of parishes comprised therein.

By the Consolidated Order Amendment Order, dated February 26, 1866, made by the Poor Law Board under the Act, the clerk to the guardians is four weeks before September 29 and March 25 respectively "to estimate the probable amount of the expenditure to the relief of the poor and other charges by the guardians on behalf of the union," and "the guardians shall make orders on the overseers . . . at the commencement of each half-year ending on the days above-mentioned . . . for the payment to the guardians of all such sums as may be required by them as the contribution of the parish to the common fund of the union."

the parish to the borough-rate out of the poor-rate." This enactment renders "borough-rate" "poor-rate." "County-rate" is by 15 & 16 Vict. c. 81, s. 26, to be raised "in like manner as the money required for the relief of the poor." The precept of the justices to the guardians of the union, a statutory form, enjoins payment of "county-rate" from and out of the moneys paid into the hands of the treasurer of your union for the uses and purposes of the union." The union exists for the administration of the poor law. A statutory order of the Poor Law Board made in 1866, provides for the payment by the overseers of parishes to the guardians of unions of contributions in respect of poor-rate "and other charges." "County-rate" is therefore levied by the poor law authorities as a part of the "poor-rate" and is itself "poor-rate."

[He referred to *East London Ry. Co.* v. *Whitechurch* (1), and *Stratton* v. *Metropolitan Board of Works.* (2)]

Bosanquet, Q.C. (*Moon*, with him), for the defendants. The defendants are not liable to be assessed to either "borough-rate" or "county-rate" under the section. When the Act passed in 1845 these rates where assessed and collected pursuant to 7 Wm. 4 & 1 Vict. c. 81, and 55 Geo. 3, c. 51. By these statutes, "borough-rate" might and "county-rate" must have been assessed and collected as a separate rate. Neither rate was made a charge on the poor-rate. The section must be interpreted as it would have been interpreted when the Act passed. If subsequent legislation can be considered at all, its effect has been merely to apply the machinery of the poor law to the collection of these rates. There has been no statutory alteration in their character. The object of each is distinct from that of the "poor-rate," and no statute speaks of either as "poor-rate."

FIELD, J. This case raises the important question whether or not a railway company, which, by s. 133 of the Lands Clauses Consolidation Act of 1845, is "liable to make good the deficiency in the assessment for poor's-rate" which the company's works have caused, can be required by the overseers to pay "borough-rate" and "county-rate" respectively as part of such "poor's-

(1) Law Rep. 7 H. L. 90. (2) Law Rep. 10 C. P. 76.

1888

FARMER v. LONDON AND NORTH WESTERN RAILWAY CO.

Field, J.

rate." I am of opinion that the contention of the overseers is right in each case, and that the company is liable to pay as poor-rate both "borough-rate" and "county-rate."

It has been argued on behalf of the company that its liability depends on the nature and incidence of these rates at the date of the passing of the Lands Clauses Consolidation Act; but this is not so. The liability of the company depends on the nature and incidence of these rates at the time when the deficiency took place. As regards "borough-rate" the case admits of no doubt. The Municipal Corporations Act, 1882, by s. 145, sub-s. 1, expressly confers on the council of a borough the power which here has been exercised of ordering the overseers of parishes to pay "borough-rate" "out of the poor-rate." "Borough-rate" is therefore a charge on or a part of the poor-rate. The case of "county-rate" is less simple, but the result of the different Acts and rules is equally clear. "County-rate" is payable out of the "Common Fund of the Union." "The Common Fund of the Union" consists entirely of the contributions of the overseers of the parishes which form the union. It has no other source. These contributions are made out of the poor-rate as the overseers have no other fund in their hands. "County-rate" is therefore also part of the poor-rate. There is a similar provision in the Corrupt Practices Commission Expenses Act, 1869 (32 & 33 Vict. c. 21). In the case of a borough these expenses are to be defrayed by the town clerk out of contributions which "the overseers of every parish or township shall pay out of the first moneys to be collected for the relief of the poor." "Borough-rate" and "county-rate" are in the same way charged on the poor-rate.

WILLS, J. I am of the same opinion. As regards "borough-rate" there is no difficulty. An Act of 1837 made the poor-rate applicable to the payment of "borough-rate," and by the Municipal Corporations Act, 1882, the poor-rate is still applicable to the same purpose. In 1845, therefore, when the Lands Clauses Consolidation Act passed and the defendants became liable, under circumstances such as have happened here, to make good deficiencies in the poor-rate, they became liable to make good such deficiencies, to whatever purposes (if legal) the poor-rate

might be applicable; and, therefore, incidentally to make good deficiencies in the borough-rate if an order should be duly made that the borough-rate should be paid out of the poor-rate; and this liability has continued down to the present time. As regards "county rate" the case is not altogether so plain. In 1845, "county-rate" was made and levied in accordance with 55 Geo. 3, c. 51, and no part of it could have been paid out of the poor-rate, so that the defendants would not then have been liable as regards this part of the plaintiffs' claim. Now, however, owing to the passing of the 15 & 16 Vict. c. 81, and other Acts, "county-rate" has been placed upon a different footing. The 15 & 16 Vict. c. 81, provides by s. 26 that the justices may issue precepts to the guardians stating the sum charged upon each parish within the union, and "requiring the guardians within such time as may be limited in such precept, to cause the aggregate of the said several sums so stated to be paid by" the guardians "out of the moneys held by them on behalf of each such parish"—i.e., out of the proceeds of the poor-rates—for the guardians have no other fund out of which they can pay the amounts of the precepts. The guardians in their turn are to raise the moneys so required to be paid "in like manner as the money required by" them "for the relief of the poor." No further special provisions as to machinery are contained in the Act, and unless amounts required for the county-rate become parts of the sums to be raised under the name of poor-rate—in other words, unless the county-rate has been charged upon and made part of the poor-rate, there is no machinery at all by which it can be collected or payments enforced. It seems to me, therefore, to have become part of the poor-rate. Our judgment must therefore be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Chester, Mayhew, Broome, & Griffithes* for *Brett & Barclay*, Manchester.

Solicitor for defendants: *C. H. Mason.*

H. D. W.

1888
May 7.

[IN THE COURT OF APPEAL.]

THE LEEK IMPROVEMENT COMMISSIONERS *v.* THE JUSTICES OF THE COUNTY OF STAFFORD.

Highway—Main Road—"Maintenance" of Road—Improvement—Liability of County Authority—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.

Converting a macadamized road into a paved road does not come within the term "maintenance" of the road as used in s. 13 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77): and therefore a highway authority cannot recover half the expenses thereby incurred from the county authority under that section.

APPEAL from the judgment of Huddleston, B., at the trial before him without a jury.

The facts were as follows:—

The action was brought by the highway authority for the Leek highway district to recover the sum of 102*l.* 18*s.*, which they claimed from the county authority, under the 13th section of the Highways and Locomotives Amendment Act, 1878, as being the half of certain expenses incurred by them in the maintenance of a portion of a road between the Leek Railway Station and Canal Wharf and the town of Leek, which was formerly a turnpike road, but having become disturnpiked had become a main road.

It appeared that the part of the road in question had been macadamized; but, the traffic being heavy and increasing, and the road requiring very frequent repairs, the plaintiffs, as the highway authority, thought it better, instead of macadamizing the road afresh, to pave it with granite setts, which was accordingly done at a cost of 205*l.* 16*s.*, the half of which sum the plaintiffs sought to recover on the certificate of the surveyor of the county authority that the road had been maintained to his satisfaction. Evidence was given on behalf of the plaintiffs to the effect that the paving was more durable than the macadamized road, and that paving, therefore, though more expensive at first, would be more economical in the long run. The learned judge held that what the plaintiffs had done to the road could not be considered as mere "maintenance" of the road, but was in the

nature of an improvement, and therefore that they could not recover the half of the expenses under s. 13 of the Highways and Locomotives Amendment Act, 1878: and he accordingly gave judgment for the defendants. (1)

Bosanquet, Q.C., and *J. Rose*, for the plaintiffs. What the plaintiffs did may fairly be considered to come within the term "maintenance" of the road. It was a reasonable thing, having regard to the nature and increase of the traffic, to lay down granite setts so as to repair the road in a more permanent manner, and prevent the necessity for constantly remetalling it. It is contended that "maintenance" or "repair" of the road is not confined to the mere restoration of it to a pre-existing state. It is a matter for the discretion of the highway authority in what way they will repair it. They have to repair the road so as to make it fit for the existing traffic. Suppose there is a large increase of traffic on a road previously little used; it may be necessary to maintain the road in a different manner from that which sufficed before. It cannot be that the "repair" of such a road is to be confined to a sort of repair which may last for a very short time only: it must be such repair as will keep the road for a reasonable time fit for the traffic. "Maintenance" of the road cannot mean maintenance of the existing physical structure.

They cited *Reg.* v. *Claxby* (2); *Reg.* v. *High Halden* (3); *Sevenoaks, &c., Ry. Co.* v. *London, Chatham, and Dover Ry. Co.* (4)

Acland, for the defendants, was not called upon.

LORD ESHER, M.R. In this case we must, in the absence of any reason to the contrary, construe the section according to the ordinary meaning of the words as applied to the subject-matter. In

(1) The section provides "that . . . one half of the expenses incurred from and after 29th September, 1878, by the highway authority in the maintenance of such road (a main road) shall . . . . be paid to the highway authority by the county authority . . . . on the certificate of the surveyor, &c. The term 'expenses' in this section shall mean the cost of repairs defrayed out of current rates, and shall not include any repayment of principal moneys borrowed or of interest payable thereon."

(2) 24 L. J. (Q.B.) 223.

(3) 1 F. & F. 678.

(4) 11 Ch. D. 625.

1883

LEEK IMPROVEMENT COMMISSIONERS v. JUSTICES OF STAFFORD.

Lord Esher, M.R.

s. 13 of the Highways and Locomotives (Amendment) Act, 1878, the legislature are, as it seems to me, referring to the "road," not in the abstract sense of the word as indicating the way from one place to another, but in the concrete sense, as indicating the physical thing itself. Referring to the road in that sense, the legislature speaks of expenses incurred not in the making of the road but in the "maintenance" of the road. The question is whether what has been done in this case comes within the term "maintenance." This road was a macadamized road. It might be that, if, owing to increasing traffic, it became necessary to use harder stone than had been used previously to repair such a road, so as to provide a better macadamized road to meet the requirements of the traffic, the highway authority in so doing would only be maintaining the road. But everybody knows that a macadamized road and a paved road are quite different things: and what the highway authority did in this case was not to maintain the macadamized road, but to remove it, and substitute another kind of road altogether; viz., a road paved with setts of granite. It appears to me that the decision of the learned judge was right and that this appeal should be dismissed.

LINDLEY, L.J. The question is not whether the plaintiffs acted judiciously in paving this road, but whether the county authority are liable to bear half of the expense of so doing under the 13th section of the Act. The section itself seems to shew in what sense the word "maintenance" is used, for it provides that the term "expenses" in the section shall mean the cost of "repairs" defrayed out of current rates, and shall not include any repayment of principal moneys borrowed, or of interest payable thereon. Although the cost of paving this road was defrayed out of the current rates, it seems to me that so paving it was more than "repairs" in the sense in which the term is used in the section; and therefore that the county authority are not liable to pay half the expenses of the paving. I therefore agree that the appeal should be dismissed.

BOWEN, L.J. I am of the same opinion. It seems to me that the term "maintenance," as used in s. 13, is equivalent to "repair." The section is dealing with roads which having been

1888

LEEK IMPROVEMENT COMMISSIONERS v. JUSTICES OF STAFFORD.

Bowen, L.J.

turnpike highways have become disturnpiked. It provides that they shall be deemed main roads, and that half the expenses incurred after a certain date by the highway authority in the "maintenance" of such roads, which, as I have said, is in my opinion, equivalent to the repair of the road, shall be paid by the county authority. By the term "repairs" is included, I think, whatever is necessary to keep the road in a proper condition for the traffic, having regard to the character and original manufacture of the road, but nothing further; just as at common law the obligation of the parish does not extend beyond the reparation of the existing road, as was decided in *Reg.* v. *Cluworth.* (1) The question is whether what was done here can be said to be repairing the road. I think the ordinary use of language forbids us to say so. It seems to me that what the plaintiffs did was really making a new road of a different kind, not repairing the old one.

Appeal dismissed.

Solicitors for plaintiffs: *Ullithorne, Currey, & Villiers, for Hacker & Allen.*

Solicitors for defendants: *F. White & Sons, for Hand & Co.*

E. L.

[IN THE COURT OF APPEAL.]

March 10; *April* 28.

HORNBY *v.* SILVESTER AND OTHERS.

Inclosure—Inclosure Act, 1845 (8 *&* 9 *Vict. c.* 118), *s.* 62—*Highway, Power to stop up—Old Inclosures.*

By the 62nd section of the Inclosure Act, 1845, power is given to the valuer acting in the matter of any inclosure to set out and make public roads and ways, and widen public roads and ways, in or over the land to be inclosed, and to stop up, divert or alter any of the roads or ways passing through the land to be inclosed, or "through any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate":—

Held, that the power of stopping up roads so given is not confined to roads passing through old inclosures or intakes from the waste or common, the subject of inclosure, but extends to roads passing through any old inclosures within the parish.

APPEAL from the judgment of the Queen's Bench Division on a special case stated by an arbitrator in an action for trespass to land.

(1) 1 Salk. 358.

1888

HORNBY v. SILVESTER.

The facts so far as material to this report were as follows:—

The plaintiff was the tenant for life of certain manors, described in the case as the Hook Manors, in the parish of Titchfield, in the county of Southampton. Prior to the making of the aftermentioned inclosure award there existed in the said parish certain roads described in the special case which were public highways. The soil of these roads respectively was part of the demesne lands of one or other of the said manors. In the year 1866 certain common lands within the said manors were inclosed under the powers of the Inclosure Act, 1845, and by the inclosure award the valuer, having set out certain new roads, awarded that the before-mentioned roads should be discontinued and stopped up. The case stated that there was no evidence that the roads so ordered to be stopped up, or any of them, were at the time of making the award roads or ways passing through land to be inclosed by the award, or through any old inclosures in the parish or respective parishes in which the land to be inclosed was situate, within the meaning of the Inclosure Act, 1845. (1)

The defendants had passed along such roads claiming that they remained public highways notwithstanding the award, and had broken open gates placed across such roads by the plaintiff, the owner of the soil, which acts constituted the trespasses complained of.

The Divisional Court (Mathew and Cave, JJ.) held that the valuer had only power under the Inclosure Act to stop up roads which passed through land to be inclosed or old inclosures by way of intake from or encroachment upon the common or waste of more than twenty years standing, which these roads were not shewn to be. They therefore gave judgment upon the case for the defendants.

Rigby, Q.C., and *Stuart Moore*, (*C. W. Matthews*, with them), for the plaintiff. The words of s. 62 of the Inclosure Act, 1845, would include, according to their natural meaning, roads passing through any old inclosures in the parish, whatever their origin.

(1) It was agreed upon the argument that the meaning of this finding of the arbitrator was that there was no evidence that the lands through which the roads passed had ever been part of the waste or common to be inclosed.

The Divisional Court have restricted their meaning to roads passing through old inclosures which are encroachments upon or intakes from the common. There is no reason derivable either from the context or the reason of the thing why the words of the section should not receive their natural meaning, viz., any old inclosures or closes of land in the parish. In other sections of the Act, such as ss. 50 and 52, where the legislature meant inclosures from the common, they have said so. If the valuer's power of stopping roads were confined to roads passing through the common lands to be inclosed or intakes from the common, it would be highly inconvenient. He could not then deal satisfactorily with the roads of the parish in many cases. The object of the section is, that the parish may not be burdened with the repair of old roads which have become unnecessary by reason of the setting out of more convenient roads. It would be impossible to effect this object satisfactorily, if the construction put on the words of the section by the Court below were adopted. It would involve an exhaustive inquiry by the valuer in each case into the circumstances under which the inclosure of the land abutting on the particular road was made and the previous character of such land. Such an inquiry would be practically impossible in many cases.

[They cited *Goodtitle* v. *Millburn* (1); *Manning* v. *Eastern Counties Ry. Co.* (2); *Rex* v. *Marquis of Downshire* (3); *Thackrah* v. *Seymour* (4); *Williams* v. *Eyton.* (5)]

Henn Collins, Q.C., and *A. J. Mackey*, for the defendants. The Court below were right in holding that the power of stopping up roads given by s. 62 is confined to roads passing through lands to be inclosed or old inclosures or intakes from the waste. The term "old inclosures," or something equivalent, is used in many sections of the Act, and it is submitted that, having regard to the general scheme of the Act, it means ancient inclosures or intakes from the common or waste as distinguished from the land to be inclosed and modern inclosures from the waste, i.e., inclosures made within twenty years. By s. 52 all

(1) 2 M. & W. 853.
(2) 12 M. & W. 237.
(3) 4 A. & E. 698.
(4) 1 Cr. & M. 18.
(5) 2 H. & N. 771; 4 H. & N. 357.

1888

HORNBY v. SILVESTER.

lands inclosed from the waste more than twenty years are to be deemed "ancient" inclosures, whereas, by s. 50, all lands illegally inclosed within twenty years are to be deemed part of the land to be inclosed. The contention for the plaintiff must be that "old inclosures" includes all lands other than the lands to be inclosed within the parish. Sect. 61 shews that this cannot be the case, for it speaks of "land to be inclosed," "ancient inclosures," and "other lands in the parish." That section deals with the making, enlargement, or alteration of watercourses which might become necessary for the purposes of the inclosure; and it would be essential in that case, for the purpose of carrying the water away, that powers should be given over any lands in the parish, and accordingly we find appropriate words there used to describe lands other than inclosures from the common. It could not have been intended to give the valuer a roving commission to stop up any road in the parish.

Rigby, Q.C., in reply, cited *Paston's Case.* (1)

Cur. adv. vult.

April 28. LORD ESHER, M.R. In this case the valuer acting under the Inclosure Act decided that certain new roads should be made, and certain old public roads should be closed. The question we have to determine is, whether he had jurisdiction to order these latter roads to be closed. These roads were public roads on lands within the parish not being lands to be inclosed, nor, so far as is known, lands which were ever portion of the waste of the manor. The question is, whether such roads are roads passing through old inclosures within the meaning of s. 62 of the Inclosure Act, 1845? If they are such roads, the valuer had jurisdiction to make the order for closing them; if they are not, he had not such jurisdiction. It was argued that these words "old inclosures" have a technical meaning in the Inclosure Act, and mean inclosures of land which was once part of the waste. The 62nd section enacts that the valuer "shall and may before he shall proceed to make any of the divisions and allotments of the land to be inclosed in pursuance of or in any manner not inconsistent with the instructions given to such valuer as aforesaid set out and make

(1) Littleton, 264, 266.

public roads and ways, and widen public roads and ways, in or over the land to be inclosed, and stop up, divert, or alter any of the roads or ways passing through the land to be inclosed, or through any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate." There are two phrases used in the section which require consideration, viz., "in or over the land to be inclosed," and "through any old inclosures in the parish." The first of these phrases must be interpreted with reference to s. 11, which provides in effect that the lands subject to inclosure under the Act shall be "all lands subject to any rights of common whatsoever," and other lands subject to certain rights of a similar nature. It is clear, having regard to that section, that the lands through which these roads pass would not come within the phrase "land to be inclosed." Looking to the two phrases as used in the section, and to the meaning of the phrase "land to be inclosed," as defined by the 11th section, I am very much disposed to think that the natural implication is, that the other phrase "old inclosures" must have been intended to bear the wider meaning. That, however, is not exactly the reason why I think those words must have what in my opinion is their natural and ordinary signification. I find, on looking at s. 27 of the Act, that the commissioners, who by the Act were to consider the expediency of the proposed inclosure, and upon what terms and conditions it should be allowed, were to consider its general effect. They were to have regard to the health, comfort, and convenience of the inhabitants of any cities, towns, villages, and populous places in or near any parish, in which the land proposed to be inclosed should be situate, as well as to the advantage of the proprietors of the land to which the application for the inclosure should relate. This shews that the whole matter was to be considered not only as between the lord of the manor and the commoners, but also with regard to the interests of the inhabitants of the neighbourhood. Sect. 34 also contains provisions to the same effect. It seems to me, having regard to the scope of such provisions, that, when it was to be considered what new roads were to be set out in connection with the inclosure, regard was to be had not only to what was desirable in the interests and for the convenience of those to whom allotments were to be made, but

1888

HORNBY v. SILVESTER.

Lord Esher, M.R.

also to the convenience and welfare of the district. The powers given with reference to the formation of new roads are not, as it appears to me, restricted to the purpose of affording access to the allotments to be made under the Act, but the opportunity is taken of dealing with the roads in the interests of the parish generally. It seems to me that, if power is given to set out new roads over the land to be inclosed for the benefit of the parish at large, it is reasonable to suppose that there would also be a power given to close any roads in the parish which may have been rendered useless or unnecessary by the new roads so set out. But there are other sections which require consideration. The 50th section provides that all inclosures, other than inclosures duly authorized by the custom of the manor or otherwise according to law, which have been made from or upon any part of the land proposed to be inclosed within twenty years, shall be deemed parcel of the land subject to be inclosed, and shall be divided, allotted, and inclosed accordingly; and section 52 provides that all lands which shall have been inclosed from any land subject to be inclosed under the Act for more than twenty years shall for the purposes of the Act be deemed and taken to be ancient inclosures. It is not stated that such lands are ancient inclosures, but that they are to be deemed to be such, and that not for all purposes, because it is further provided that they are not to carry any right of common or compensation or allotment for or in respect of right of common which might be claimed in respect of ancient inclosures. I cannot see, either in this provision or elsewhere, any reason for giving to the words "old inclosures" in s. 62 any other than their ordinary meaning, that is to say, of inclosures that have existed for a length of time, whether the lands of which they consist were originally common lands or not. It follows, therefore, that the valuer had jurisdiction to shut up these roads. For these reasons I think the judgment of the Court below was wrong, and that this appeal should be allowed and judgment given for the plaintiff.

FRY, L.J. I also am unable to agree with the decision of the Court below. The question which we have to determine is as to the meaning of the words "old inclosures" as used in s. 62.

That section deals with the formation of new roads and the diversion and discontinuance of old roads. It is to be observed in the first instance that the words are not "any old inclosures on the common," or "from the waste," or any such expression as these, but "any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate." If these words were intended to mean only old inclosures from the common or waste, then all I can say is that the method of expression adopted is very circuitous. The first inquiry that seems to be material is as to the natural, ordinary meaning of the words "old inclosures in the parish." But for the decision of the Divisional Court I should have entertained no doubt that, according to their ordinary meaning in the English language, the words plainly mean all lands anciently inclosed within the parish whatever their condition before such inclosure, whether they were originally parts of the waste or not. Again, the reason and justice of the case tend to the same conclusion. There seems to be no reason why a road, which has become useless, should be closed if it runs between inclosures taken from the common to be inclosed, but should not be closed if it runs between old inclosures not originally part of the common. Where, by reason of the formation of a new road, an old road has become useless or unnecessary, in either case it seems reasonable that it should be closed. Therefore good sense appears to require that the wider meaning should be given to the words.

Again, inquiring into the meaning of similar words in other clauses of the statute, I find two distinct sets of expressions, not used with very great exactness perhaps, but nevertheless indicating clearly enough, where they are used, the same things respectively. Sect. 61 speaks of "ancient inclosures or other lands in the parish" in contrast with "land to be inclosed." Plainly in that section every ancient inclosure is included without reference to the original character of the land. In s. 86 we find the same contrast between "any old inclosed lands" and land to be inclosed. Then, on the other hand, there are many sections in which are found sets of expressions accurately describing inclosures made on or from the common. Sect. 50, for instance, deals with "inclosures made from any part of the land proposed to be inclosed,"

1888

HORNBY v. SILVESTER.

FRY, L.J.

using, therefore, quite different language from that now in question. So, again, in s. 52 I find the legislature speaking of land "inclosed from any land subject to be inclosed under this Act," which shews that they well knew how to describe inclosures from the common as distinguished from ancient inclosures in general.

Then, going a little further and looking at the provisions of 41 Geo. 3, c. 109, an earlier Act in pari materiâ, and unrepealed (s. 4), I find that the scheme of that Act required the commissioners under it to take a general survey of all the lands in the parish for the purpose of considering how the uninclosed lands should be distributed, and that the Act, in so providing, describes the one class of lands thus, "all the lands and grounds to be divided, allotted and inclosed by any such Act," and the other class as "all the messuages, cottages, orchards, gardens, homesteads, ancient inclosed lands and grounds within any such parish or manor." These words clearly mean "ancient inclosures" without reference to whether they were originally portion of the common or waste or not. These words are very similar to those we have to construe, and it will be found that that statute uses very similar language in other sections to which it is not necessary to refer.

Lastly, I have gone somewhat further and looked into a volume containing a number of the private Acts passed for the inclosure of commons, of which, according to Mr. Seebohm in his book on the English Village Community, no less than 4000 were passed between 1760 and 1844, with the result that I can scarcely find a single private Inclosure Act in which the words we are now considering, or similar words, are not used to denote ancient inclosures of whatever origin, not merely ancient inclosures from the common or waste. For these reasons I think we must give the words of the 62nd section their natural and ordinary meaning: and consequently that this appeal should be allowed.

LOPES, L.J. This case depends upon what is the meaning of the words "old inclosures" contained in s. 62 of the Inclosure Act, 8 & 9 Vict. c. 118.

The section provides that "in the first place the valuer acting in the matter of any inclosure shall and may, before he shall

proceed to make any of the divisions and allotments of the land to be inclosed, set out and make public roads and ways and widen public roads and ways on or over the land to be inclosed, and stop up and divert or alter any of the roads or ways passing through the land to be inclosed or through any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate."

If "old inclosures" means old inclosures of twenty years' standing as defined by s. 52 of the Act only, the judgment of the Court below is right and the arbitrator had no power to stop up the roads in question, but, if on the other hand "old inclosures" means and includes the old inclosures in the parish as well as inclosures of twenty years' standing inclosed from the land subject to be inclosed, then the judgment of the Court below is wrong and the arbitrator had power to stop up the roads in question.

During the argument I was inclined to adopt Mathew, J.'s, construction of the words "old inclosures," and thought they referred only to inclosures of twenty years' standing mentioned in s. 52.

After careful consideration, I have come to the conclusion that this view cannot be maintained.

Sect. 52 enacts that all lands which shall have been inclosed from any land subject to be inclosed under this Act for more than twenty years next preceding the day of the first meeting shall for the purposes of this Act be deemed and taken to be ancient inclosures. I think the legislature hereby intended to extend the meaning of the words "old inclosures" and not to exhaust or limit them. This section puts inclosures of twenty years' standing from the land subject to be inclosed in the same category with old inclosures, that is, with old inclosures in the parish, not being inclosures of the land to be inclosed of twenty years' standing, but old inclosed lands in the ordinary sense of those words. It does not appear to me that there is any substantial distinction between "old inclosures" and "ancient inclosures." I find the terms, "ancient inclosures" and "old inclosures" almost invariably used in private inclosure Acts to denote inclosed lands in the ordinary sense of the words. These private Acts always direct a survey and measurement of the fields, meadows, and commons, yards, gardens, &c., and other ancient

1888

HORNBY v. SILVESTER.

Lopes, L.J.

inclosures in the parish or manor where the inclosure is to take place. It is impossible to peruse these private Acts without coming to the conclusion that the words "old" or "ancient inclosures" have a recognised meaning and refer to inclosed lands in the ordinary sense and not to inclosures from the common. It is said, however, that this construction is inconsistent with s. 61 of the Act, which gives the valuer power to make watercourses, &c., because the power is there given to him not only over the land to be inclosed and in "ancient inclosures" but also in other lands in the parish or respective parishes in which the land to be inclosed may be situated. It is said that, where the legislature intended more than inclosures of twenty years' standing, it used words to signify that intention, for instance "other lands in the parish," and that, if the power contended for was meant to be conferred by s. 62, some such expression would have been used. It occurs to me that larger words were used in s. 61, because it is not improbable that it might be necessary to enlarge, cleanse, or alter, and improve ditches and watercourses, &c., which were neither in the land to be inclosed nor in any ancient inclosures, as for instance by the side of roads. This, while it would account for the difference in the language of the two sections, would in no way limit the application of the words "any old inclosures in the parish or respective parishes," as used in s. 62.

Sect. 50 relates to inclosures within twenty years, and provides that they are to be deemed parcel of the lands subject to be inclosed, unless authorized by the custom of the manor, or otherwise according to law, for instance, approvement by the lord of the manor.

In my opinion, the valuer had power to stop up the roads in question, and I think the plaintiff is entitled to succeed. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for plaintiff: *Burn & Galloway, for Goble & Warner.*

Solicitors for defendants: *Donnithorne & Ewer, for Nicholas Donnithorne.*

E. L.

MASTERS *v.* GREEN.

1888
April 18.

Landlord and Tenant—Agistment of Cattle—"Live Stock taken in by the tenant of a holding to be fed at a fair price"—Privilege from Distress—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 45.

Cattle were distrained while on a holding pursuant to an agreement by which the tenant, in consideration of 2*l.*, allowed the owner "the exclusive right to feed the grass on the land for four weeks":—

Held, that the cattle were not "taken in" by the tenant "to be fed at a fair price," within the meaning of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 45, and were therefore not privileged from distress.

APPEAL from the County Court of Somersetshire.

The action was for trespass by the defendant, the landlord of a farm, in distraining cattle belonging to the plaintiff, privileged, as alleged, from distress, as "taken in by the tenant to be fed at a fair price" within the meaning of sect. 45 of the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61). (1) The cattle were distrained for arrears of rent due from the tenant while on the farm, pursuant to an agreement by which the tenant, in consideration of 2*l.*, granted to the plaintiff "the exclusive right to feed the grass on the land for four weeks." It was agreed that the only question to be decided was whether this agreement was within the statute.

(1) By 46 & 47 Vict. c. 61, s. 45: "Where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainer a sum equal to such price as aforesaid, and any payment so made to the distrainer shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding: Provided always, that so long as any portion of such live stock shall remain on the said holding the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been bonâ fide paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid."

1888

MASTERS v. GREEN.

The county court judge held that the agreement was not a contract by the tenant for the agistment of the plaintiff's cattle, and that for this reason the statute did not apply, and the distress was not illegal, and gave judgment for the defendant, but gave leave to the plaintiff to appeal.

W. H. Clay, for the plaintiff. The cattle distrained were privileged from distress under s. 45 of the Agricultural Holdings Act, 1883. They were on the tenant's land under a contract with the tenant for their agistment. They had been "taken in to be fed at a fair price."

[FIELD, J.:—May it not be contended that the agreement amounts to a demise by the tenant of the surface of the soil? Is not the sum payable under it rather in the nature of rent than the "price" of pasturage?]

It does not appear that the tenant had power to sublet. In substance he undertook to agist the plaintiff's cattle for two months. If a definite number of cattle had been mentioned in the agreement, it would obviously have been a contract of agistment, and an agistment was intended by the parties. The expression "taken in to be fed at a fair price" is a popular expression, and no technical terms are used throughout the section. It has been held that the section protects from distress cows as "taken in to be fed at a fair price," when the tenant is to be paid for the pasturage not in money but in kind, receiving "milk for meat": *London and Yorkshire Bank* v. *Belton*. (1)

W. B. Odgers, for the defendant, was not heard.

FIELD, J. I am of opinion that the cattle distrained were not privileged from distress as "live stock taken in by the tenant to be fed at a fair price" within the meaning of s. 45 of the Agricultural Holdings Act, 1883."

At a certain period of the year a tenant farmer wishes to dispose of his aftermath. He may not himself have live stock enough to consume it. Of course under these circumstances he may himself mow it, but he may also render available this part of his interest in the land in one of two ways. He may take some other

(1) 15 Q. B. D. 457.

person's cattle on to the farm and agist them, or, if his holding is on terms such as to enable him to so, he may demise to some other person for a given time the "herbagium" or "vestura terræ." In the latter case Lord Coke says that the person to whom the land is thus demised "shall have an action of trespass quare clausum fregit." (1) The two transactions are therefore essentially different. In the present case I am not concerned to decide whether this agreement by which the tenant gives to another "the exclusive right to feed the grass on the land for four weeks" amounts to a demise of the surface of the soil. The only question is whether cattle which are on the land under this agreement are "taken in" by the tenant "to be fed at a fair price." It appears to me that the tenant does not agree either to "take in" or to "feed" the cattle, and that the sum which he is to receive is not the "price" of the feed of the cattle, but a payment in the nature of rent for use and occupation. The object of the Act, like that of the Lodgers' Goods Protection Act, is to prevent the goods of one man being taken to pay the debt of another, and, so far as its policy is concerned, I see no valid distinction between the cases, and no reason why these cattle, just as much as cattle taken on the farm to be agisted, should not be exempt from distress. The duty of the Court is, however, to apply the words of the Act, and in my opinion this transaction is not within them.

WILLS, J. I am of the same opinion. The question for our decision is simply whether or not cattle grazing on a farm under an agreement between their owner and the tenant for "the exclusive right to feed the grass for four weeks" can be said to be "taken in" by the tenant "to be fed at a fair price," and are for this reason privileged from distress under s. 45 of the Agricultural Holdings Act, 1883. We have to give a natural meaning to the words "taken in to be fed at a fair price." Now there is a process well-known among farmers, and usually described by a term of which the words in question are a paraphrase. I mean, of course, agistment. But a grant by a tenant of the "exclusive right to feed the grass" on his farm for a given time is not in

(1) Coke upon Littleton, 4 b.

1888

MASTERS v. GREEN.

Wills, J.

my opinion an undertaking by him to agist the cattle which may be put upon the land, and cattle put upon the land under such an agreement cannot, except by a very strained use of language, be said to be "taken in" by the tenant "to be fed at a fair price." Had the tenant sub-let the whole of his holding, the question could scarcely have arisen. He could not have been said to "take in to be fed at a fair price" cattle put upon land which he had ceased to occupy. Yet, so far as regards the policy of this enactment, which is, roughly speaking, to prevent stock not belonging to the tenant being distrained for the tenant's debt, a sub-lessee of a whole holding has as much claim to protection as a sub-lessee of part of a holding. Our duty is to construe the words of the Act, and in my opinion the plaintiff's cattle were not within them, and were not privileged from distress. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Bolton, Robbins, Busk, & Co., for Hobbs & Davies, Wells, Somersetshire.*

Solicitors for defendant: *Prior, Church, & Co., for Welsh, Son, & Chubb, Wells, Somersetshire.*

H. D. W.

April 18.

THE QUEEN *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF WAKEFIELD.

Local Government Acts—Highway—Indictment for Non-repair—Urban Sanitary Authority—County Authority—Highways and Locomotives (Amendment Act, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 10.

An indictment will lie, under s. 10 of the Highways and Locomotives (Amendment) Act, 1878, against an urban sanitary authority, acting as the highway authority of the district, for non-repair of a highway.

RULE, obtained by the mayor, aldermen, and burgesses of the borough of Wakefield, calling upon the prosecutors to shew cause why an indictment found against the mayor, aldermen, and burgesses, as the highway or urban sanitary authority of the district, should not be quashed.

By s. 10 of the Highways and Locomotives (Amendment) Act,

1878 (41 & 42 Vict. c. 77), "where complaint is made to the county authority that the highway authority of any highway area within their jurisdiction has made default in maintaining or repairing all or any of the highways within their jurisdiction, the county authority, if satisfied after due inquiry and report by their surveyor that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the duty of the highway authority in the matter of such complaint.

"If such duty is not performed by the time limited in the order, and the highway authority fail to shew to the county authority sufficient cause why the order has not been complied with, the county authority may appoint some person to perform such duty, and shall by order direct that the expenses of performing the same, together with the reasonable remuneration of the person appointed for superintending such performance, shall be paid by the authority in default, and any order made for payment of such expenses and costs may be removed into the High Court of Justice, and be enforced in the same manner as if the same were an order of such Court.

"Any person appointed under this section to perform the duty of a defaulting highway authority shall, in the performance and for the purpose of such duty, be invested with all the powers of such authority other than the powers of making rates or levying contributions by precept, and the county authority may from time to time, by order, change any person so appointed.

"Where an order has been made by a county authority for the repair of a highway on a highway authority alleged to be in default, if such authority, within ten days after service on them of the order of the county authority, give notice to the clerk of the peace that they decline to comply with the requisitions of such order until their liability to repair the highway in respect to which they are alleged to have made default has been determined by a jury, it shall be the duty of the county authority either to satisfy the defaulting authority by cancelling or modifying in such manner as the authority may desire the order of the county authority, or else to submit to a jury the question of the liability of the defaulting authority to repair the highway.

1888

THE QUEEN v. MAYOR, &c., OF WAKEFIELD.

"If the county authority decide to submit the question to a jury they shall direct a bill of indictment to be preferred to the next practicable assizes to be holden in and for their county, with a view to try the liability of the defaulting authority to repair the highway. Until the trial of the indictment is concluded the order of the county authority shall be suspended. On the conclusion of the trial, if the jury find the defendants guilty, the order of the county authority shall forthwith be deemed to come into force; but if the jury acquit the defendants the order of the county authority shall forthwith become void.

"The costs of the indictment, and of the proceedings consequent thereon, shall be paid by such parties to the proceedings as the Court before whom the case is tried may direct. Any costs directed to be paid by the county authority shall be deemed to be expenses properly incurred by such authority and shall be paid accordingly out of the county rate; and any costs directed to be paid by the highway authority shall be deemed to be expenses properly incurred by such authority in maintenance of the roads within their jurisdiction, and shall be paid out of the funds applicable to the maintenance of such roads."

On May 3, 1887, a complaint was made to the justices of the West Riding assembled at quarter sessions, as the county authority for the Riding, that the highway authority of the borough of Wakefield had made default in repairing a highway within their jurisdiction, and after due inquiry and report by their surveyor the county authority, being satisfied that the highway authority had been guilty of the alleged default, ordered the highway authority to perform the duty of maintaining and repairing the highway in question.

On May 20, 1887, the highway authority gave notice to the clerk of the peace for the West Riding that they declined to comply with the requisitions of such order until their liability to repair had been determined by a jury. On June 27, 1887, the county authority directed that an indictment should be preferred against the highway authority with a view to try their liability to repair the highway. An indictment was preferred accordingly, and a true bill was found by the grand jury at Leeds Assizes on July 30, 1887.

The indictment contained no allegation that the provisions of s. 10 of the Highways and Locomotives Amendment Act (1878) had been complied with. The indictment was removed by writ of certiorari into the Queen's Bench Division on January 19, 1888, and the highway authority obtained this rule on March 26.

Forbes, Q.C. (*C. M. Atkinson*, with him), for the county authority, shewed cause. All the preliminary steps specified in s. 10 of the Highways and Locomotives (Amendment) Act, 1878, having admittedly been taken in this case, it is clear, from the terms of that section, that an indictment will lie against the highway authority. *Reg.* v. *Mayor, &c., of Poole* (1) is not an authority to the contrary. That decision was not upon the Act in question here, which provides a wholly new and distinct procedure.

[He was stopped.]

Tindal Atkinson, Q.C., and *Asquith*, for the highway authority, supported the rule. Up to the passing of the Act of 1878 an indictment against an urban sanitary authority for non-repair of a highway was unheard of. Sect. 10 only directs that an indictment shall be preferred to try the question of the liability of the urban sanitary authority to repair. It is submitted that the legislature intended that the old procedure should be continued, namely, that the indictment should be preferred against the inhabitants: *Reg.* v. *Mayor, &c., of Poole.* (1)

If the highway authority are liable to an indictment, the liability is statutory only, and the indictment should shew on its face that all the preliminary steps required by s. 10 have been taken: *Reg.* v. *Mayor, &c., of Poole.* (1)

[THE COURT thought that this point was not open on the terms of the rule.]

CAVE, J. The meaning of s. 10 is perfectly clear. The first clauses of that section point out the mode in which the county authority may compel the highway authority to maintain or repair the highway. Upon complaint being made to the county authority they shall, if satisfied after due inquiry and report by their surveyor that the highway authority has been guilty of the

(1) 19 Q. B. D. 602.

1888

THE QUEEN v. MAYOR, &c., OF WAKEFIELD.

Cave, J.

alleged default, make an order limiting the time for the performance of the duty of the highway authority in the matter of such complaint; and if such duty is not performed within the time limited in the order, and the highway authority fail to shew sufficient cause why the order has not been complied with, the county authority may appoint some person to perform such duty, and shall by order direct that the expenses shall be paid by the defaulting authority; and then follow provisions for enforcing the order in the High Court. So far there is no provision for any indictment or judgment at law against the highway authority. There is only the order directing them to repair, and on their default a power to appoint some one else to do the work and charge them with the expenses. So far, therefore, the machinery is complete within itself. Then the legislature proceeds to deal with cases in which the highway authority has some cause to shew why they should not do the work; and provides that in such cases they are not to be precluded from raising the question of their liability to repair. When the order to repair has been made upon them, they may, within ten days, give notice to the clerk of the peace that they decline to comply with the requisitions of the order until their liability to repair has been determined by a jury; and the county authority are then bound either to satisfy the highway authority by cancelling, or modifying in such way as they may desire, the order to repair, or else to submit to a jury the question of the liability of the highway authority to repair. If the county authority decide to submit the question to a jury, they "shall direct a bill of indictment to be prepared to the next practicable assizes to be holden in and for their county, with a view to try the liability of the defaulting authority to repair the highway." It is clear that the old indictment against the parish for non-repair of a highway is not meant. It is a special mode provided by the statute of enabling the highway authority to have the question of their liability tried. If the jury find the defendants guilty—that is, if they come to the conclusion that the defendants had no good cause for declining to obey the order to repair—then what happens? Not the ordinary consequences of a verdict of guilty on an indictment for non-repair of a highway, but an entirely different

result. The suspended order regains its force, and, if the highway authority does not repair, the county authority themselves appoint some one to do the work, and the expenses are to be charged upon the rates levied for the maintenance of the roads within the highway authority's district. It is clear that the indictment is provided by the statute as a specific mode of enabling the highway authority to raise any question which they wish to have decided with respect to their liability to repair. But for the machinery of the indictment they would be compelled at once to do the work themselves, and the indictment enables them to bring their objection before a judge and jury. If they succeed, the order of the county authority forthwith becomes void; if they fail, the order forthwith comes into force. Moreover, the section enacts that the costs of the indictment and proceedings consequent thereon are to be paid by "such parties to the proceedings as the Court shall direct;" and any costs directed to be paid by the highway authority are to be deemed expenses properly incurred by the authority. How can the costs be directed to be paid by the highway authority, unless they are parties to the proceedings? I am clearly of opinion that the Act intends the indictment to be against the highway authority.

A. L. SMITH, J. I am of the same opinion. Under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), an indictment for non-repair of a highway is against the inhabitants of a parish, and the same machinery is continued in the Highway Act, 1862 (25 & 26 Vict. c. 61). It is clear from those statutes, and from the decision in *Reg.* v. *Mayor, &c., of Poole* (1), that an urban sanitary authority, apart from the Act of 1878, could not be indicted for non-repair of a highway within their district, but that the indictment must be against the inhabitants. But the Act of 1878 introduced a wholly different state of things. It provided a statutory mode of raising the question of the highway authority's liability to repair. It was argued that the statute meant to incorporate the old law, and that the indictment mentioned in s. 10 was meant to be the old indictment against the inhabitants. I am of opinion that that argument is wholly

(1) 19 Q. B. D. 602.

1888

THE QUEEN v. OF WAKEFIELD.

A. L. Smith, J.

without foundation, because s. 10 provides that the costs of the indictment and of the proceedings consequent thereon shall be paid by such parties to the proceedings as the Court shall direct; and any costs directed to be paid by the highway authority shall be deemed to be expenses properly incurred by such authority in the maintenance of the roads within their jurisdiction, and shall be paid out of the funds applicable to the maintenance of such roads. It is absolutely clear, therefore, that the Act intends the highway authority to be parties to the indictment. If the opposite contention were well-founded, and the indictment could only lie against the inhabitants, the two inhabitants indicted would have to pay the costs.

Rule discharged.

Solicitors for justices: *Badham & Williams, for W. L. Williams, Wakefield.*

Solicitors for urban sanitary authority: *Sharpe, Pritchard & Sharpe, for Town Clerk of Wakefield.*

W. A.

March 2, 3.

[IN THE COURT OF APPEAL.]

IN RE LORD COLIN CAMPBELL.

Bankruptcy—Removal of Disqualifications of Bankrupt—Certificate that Bankruptcy was caused by "Misfortune without any Misconduct" on the part of the Bankrupt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 32.

By s. 32 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), certain disqualifications are imposed upon a bankrupt, which are to be removed if he obtains from the Court his discharge, with a certificate that his bankruptcy was "caused by misfortune without any misconduct on his part." The debtor instituted a suit for a divorce against his wife and co-respondents on the ground of her adultery. At the trial the jury found that the wife had not committed adultery, and the petition was dismissed, and the debtor was ordered to pay the costs of his wife and of the co-respondents. The means of the debtor both before and after the commencement of the proceedings were wholly insufficient to pay these costs, and he was adjudged a bankrupt on the petition of one of the co-respondents:—

Held, that the bankruptcy of the debtor had not been "caused by misfortune without any misconduct on his part" within the meaning of s. 32, and that he was not entitled to the certificate described in the section.

APPEAL against the refusal to grant the bankrupt a certificate, under s. 32 of the Bankruptcy Act, 1883, "to the effect that his

1888

IN RE LORD COLIN CAMPBELL.

bankruptcy was caused by misfortune without any misconduct on his part."

On November 6, 1884, the bankrupt's wife presented a petition to the Divorce Division of the High Court for a divorce from her husband, on the ground of his adultery. She had in March, 1884, obtained a decree for a judicial separation, and an order was made in that suit that he should pay her permanent alimony at the rate of 144*l.* per annum. On November 7, 1884, the bankrupt presented a petition for a divorce from his wife, on the ground of her adultery. To this petition the Duke of Marlborough, Captain Shaw and Colonel Butler were made co-respondents. The petition was presented under the advice of counsel, who gave an opinion that, on the facts stated in the case submitted to them, the bankrupt would be quite justified in taking proceedings for a dissolution of his marriage on the ground of his wife's adultery, and advised him to commence such proceedings at once, and to make the above-mentioned three persons co-respondents. In April, 1885, on the advice of the same counsel, a Mr. Bird was added as a fourth co-respondent.

The two petitions were tried together in November and December, 1886, the trial lasting for eighteen days, when the jury found that neither the bankrupt nor his wife had committed adultery. The petitions were both dismissed, and the bankrupt was ordered to pay the costs of his wife and of all the co-respondents of his petition, and his wife's costs of her petition not exceeding 150*l.* The costs of the Duke of Marlborough were afterwards taxed at 971*l.* 13*s.* 2*d.*, and, on his petition in bankruptcy in respect of those costs, a receiving order was made against the bankrupt, and an adjudication of bankruptcy was afterwards made against him.

The bankrupt's statement of his affairs shewed that his unsecured debts amounted to 8622*l.* 6*s.* 8*d.*, and that his assets were estimated to produce 110*l.* 7*s.* Among the debts were the above amount of costs due to the Duke of Marlborough; 543*l.* 9*s.* 6*d.*, the taxed costs of Captain Shaw; 770*l.* 16*s.* 3*d.*, the costs of Mr. Bird; 627*l.* 7*s.*, the taxed costs of the bankrupt's wife; and 2016*l.* 15*s.* 3*d.*, due to the bankrupt's own solicitors.

On an application by the bankrupt for an order of discharge

1888

IN RE LORD COLIN CAMPBELL.

the official receiver reported to the Court that up to December 2, 1887, the bankrupt's assets had realised the sum of 119*l.* 10*s.*, and that the future receipts were estimated at 25*l.*

And, having regard to s. 28 of the Act, the official receiver reported that "the bankrupt attributes his failure and deficiency entirely to the result of proceedings in the Divorce Court, and to the costs thereby incurred, which, including the costs of his own solicitors, amounted to 4943*l.* 11*s.* 6*d.*

"The bankrupt states that, during the three years preceding the receiving order, he had been in the receipt of an income of 600*l.* per annum; that of that amount 400*l.* per annum was derived from an alimentary allowance for his life, under a settlement executed on his marriage in 1881; 100*l.* per annum as director of a company; and a further 100*l.* per annum as an allowance from his father.

"The bankrupt also states that he is entitled to a reversionary interest on the death of his father in a capital sum of 10,000*l.*; that in December, 1886, he executed a deed of assignment of the above interest to his father, in consideration of his becoming responsible for moneys advanced to him amounting to 5850*l.*"

The official receiver also reported that he had no evidence of the bankrupt having been guilty of any misconduct such as is mentioned in s. 28 of the Act.

An unconditional order of discharge was granted to the bankrupt, and he afterwards applied to the Court, under s. 32 of the Act, for a certificate that his bankruptcy was caused by misfortune without any misconduct on his part. The registrar refused the application. The bankrupt appealed.

Finlay, Q.C., and *Herbert Reed*, for the bankrupt. The certificate ought to have been granted. The bankruptcy was caused by "misfortune without any misconduct" within the meaning of s. 32. (1) The registrar seemed to think that it was "misconduct"

(1) Sect. 32 provides: (1.) "Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for" sitting or voting in the House of Lords; being elected to, or sitting or voting in the House of Commons, and holding or exercising various specified offices.

"(2.) The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when,—

1888

IN RE LORD COLIN CAMPBELL.

to institute the divorce suit, when the bankrupt had not the means of paying the costs of the co-respondents if he failed. But there was good ground for commencing the suit; he acted under legal advice, and he was fully justified in so doing. His failure is a misfortune not attributable to him. It was the result of the evidence adduced on the other side, which the jury believed. He could not have known this before he brought the action. There is no moral blame attributable to him. The verdict of the jury was not under his control. Believing, as he did, in the righteousness of his case, he was bound in honour to take the proceedings. It was impossible to foresee that the trial would last so long, or that the costs would be so heavy. If a man failed in an action because all the witnesses on whom he relied to prove his case had died, it would surely be a "misfortune," and it is equally a "misfortune" if he fails because the jury do not believe his witnesses. If a man sends a ship to sea and she is lost in a storm, it would be said to be a "misfortune," though he exercised volition in sending the ship. If the bankruptcy has not been caused by "misconduct," it must have been caused by "misfortune." The idea is, ill-luck without "misconduct," i.e., conduct involving moral blame. Whatever evil happens to a man is due either to his "misfortune" or his fault. "By misfortune without any misconduct" means "purely by misfortune." The litigation was no doubt causa sine quâ non of the bankruptcy, but it was not the causa causans, the proximate cause. That cause was the evidence of the witnesses on the other side, and this was a "misfortune."

Sidney Woolf, for the trustee in the bankruptcy. The means of the bankrupt were such that he was not in a position to pay the costs of the divorce suit if he should fail in it. The bankruptcy was entirely due to his inability to pay those costs, and this was the direct result of his own act in instituting the proceedings. It cannot properly be said that the bankruptcy was

"(*a.*) The adjudication of bankruptcy against him is annulled; or,

"(*b.*) He obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part.

"The Court may grant or withhold such certificate as it thinks fit, but any refusal of such certificate shall be subject to appeal."

1888

IN RE LORD COLIN CAMPBELL.

caused by "misfortune." Sect. 32 means "from misfortune as distinguished from and without misconduct": *In re Burgess.* (1) Moreover, s. 32 provides that the certificate is to be obtained with the discharge. Here the application for the certificate was made after the discharge had been granted.

[LORD ESHER, M.R. That is a mere technicality.]

Finlay, Q.C., in reply.

LORD ESHER, M.R. Our first duty in regard to the present case is to construe s. 32 of the Bankruptcy Act, 1883. This is not an easy task, because to do so we have to consider s. 28 of the same Act, although the two sections are not directly connected with each other. Under s. 28, a bankrupt may apply for an order of discharge, and the Court has to consider and determine whether to grant or to refuse it. A number of facts, mainly, but not exclusively, connected with improper trade dealings, are enumerated, which may prevent the bankrupt from getting his discharge at all, or lead to its being suspended, or to its being granted subject to conditions. Then, turning to s. 32, we see that, if the bankrupt has been guilty of any such misconduct as is mentioned in s. 28, the provisions of s. 32 for the removal of his disqualifications cannot apply, because they apply only where there has been no misconduct on his part, and where a discharge is granted to him. Sect. 32, however, is highly penal, for it deals with matters affecting the after-life of a bankrupt, even though he has obtained his discharge. It enacts that by reason of the mere fact of the bankruptcy certain disqualifications shall attach to the debtor, but it contains a provision that these disqualifications "shall be removed and cease," if one or other of two things happens. The disqualification is to cease if the adjudication of bankruptcy is annulled, or if the debtor obtains his discharge with a certificate that his bankruptcy was caused by "misfortune without any misconduct on his part." I admit that we must construe the clause strictly, but we have no right to give to the words any other than their ordinary meaning. We have no right to strike out the words "by misfortune," and read the sentence as if it ran that the disqualification should be

(1) 4 Morell's Bankruptcy Cases, 190.

removed if the debtor obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused without any misconduct on his part. The argument addressed to us was that, if there was no "misconduct," there must have been "misfortune" only. But the result of that would be to read the section in the way I have pointed out, and to strike out the words "by misfortune." It is impossible to give an exhaustive definition of the meaning to be attached to "misfortune." I think, however, we must hold that, when the bankruptcy is not solely the result of some accident over which, or over the direct conducing causes of which, the debtor has no control, it cannot be said to arise from "misfortune." I do not say that in all cases the words "by misfortune" are to be coupled with the subsequent words, but I think that, when the bankruptcy is caused partly by misfortune and partly by misconduct, these being independent of one another, the certificate cannot be granted. Where the bankruptcy is not the direct consequence of misfortune unconnected with any misconduct the saving clause does not apply.

What, then, was the cause of the bankruptcy in the present case? In truth it was the adverse verdict of the jury. We are bound to assume that the verdict given by the jury was right. What, then, was the conducing cause of that verdict? It was the fact of the bringing and carrying on of the suit, a matter which was entirely within the control of the debtor. The costs incurred in that suit were thus the direct result of matters over which the debtor had control, and, therefore, without going into the question of the effect of the evidence in the divorce suit brought forward by the co-respondents, and without saying that it was rash to bring the suit, or that the doing so involved any misconduct, I think the appellant fails, because he has not shewn that his bankruptcy was caused by "misfortune."

FRY, L.J. The word "misfortune" is as familiar in common language as the thing itself is in life, but this Act of Parliament has, so far as I know, for the first time used the word to express a legal conception, i.e., a notion capable of such exact definition that it can be predicated of any event, as a matter, not of opinion,

1888

IN RE LORD COLIN CAMPBELL.

Fry, L.J.

but of judicial decision, that it is or is not a misfortune. From the vague and inexact nature of the thought expressed by the word there arises a difficulty. To solve this difficulty we must regard the object and intent of the legislation in which the word occurs. The thought which underlies the enactment in s. 32 appears to me to be this—that he who has made shipwreck of his own fortunes is not fit to be trusted to guide and care for the interests of others. If you have not been faithful in that which is your own (if I may venture to invert a well-known passage) who shall give you that which is another man's? Such seems to me the general character of the principal enactment of this clause, which creates a disqualification for a wide range of public duties—from sitting in the House of Lords to serving on a select vestry. But to the general rule there is annexed a proviso, that in either of two events no such disqualification shall attach. I pause here to observe first, that the statute throws on the debtor the burden of proving that he comes within the exceptions; and, secondly, that the power of the Court to grant the certificate is a discretionary power. It appears to me that what the legislature had in view in this proviso was, the possibility of there being cases in which a man might become a bankrupt without thereby raising a presumption of his unfitness for holding a public position. It has been argued that this cannot have been so, because the disqualifications are to be removed when the bankruptcy is annulled. It may be, however, that the legislature desired to induce the friends of a debtor to come forward and pay his debts, or they may have thought that his paying his debts himself at a later period gave evidence of industry and self control which should remove the disability.

I shall not attempt to give any exhaustive definition of either "misfortune" or "misconduct," as used in this section; it is too early in the history of this legislation; nevertheless, we should, I think, make some essay towards a definition. It appears to me that, for the purposes of the present discussion, "misfortune" is equivalent to some adverse event not immediately dependent on the actions or will of him who suffers from it, and of so improbable a character that no prudent man would take it into his calculations in reference to the interests either of himself or of others.

I will endeavour by way of example to illustrate my meaning. A man who was reduced to poverty by an act of God destroying his property, might be said to have suffered from misfortune without any misconduct on his part. The prosperity of Job was overthrown by the simultaneous concurrence of four unusual events, the attack of the Sabeans, the inroad of the Chaldeans, the fire from heaven, and the wind from the wilderness: and his consequent poverty might have been regarded as in no way disqualifying him from holding any office of trust in his tribe. But, on the other hand, a man who gambles so that if he is unsuccessful he cannot pay his creditors, does not owe his situation to misfortune without misconduct; though he would probably say that he had been unfortunate in his play.

It has been pressed upon us that the idea conveyed in the clause is a single idea, but to this I cannot agree. In my opinion, there are two distinct ideas, and, if the event which causes the bankruptcy is due partly to "misfortune" and partly to "misconduct," it cannot come within the exemption.

Applying these observations to the case in hand, it presents itself in this way. A man of slender means brings an action, and incurs expenses in support of it, far beyond anything he can pay should he fail. The action is unsuccessful, and under such circumstances that the Court in its discretion visits him with costs; and he becomes bankrupt in consequence. Is the event which induced his bankruptcy, under these circumstances, "misfortune without misconduct?" It is apparent, from what I have said, that I do not think so. The circumstances which led to the bankruptcy were directly within the will and under the control of the bankrupt, and I cannot come to the conclusion that in such a case the bankruptcy was caused "by misfortune without any misconduct" on his part.

LOPES, L.J., concurred.

Appeal dismissed.

March 16. THE COURT gave leave to appeal to the House of Lords.

Solicitors for bankrupt: *C. O. Humphreys & Sons.*

Solicitors for trustee: *Lewis & Lewis.*

W. L. C.

1888
April 17.

CHAPMAN *v.* WITHERS.

Sale of Goods—Warranty—Sale of Horse—Condition for Return—Horse disabled—Non-return—Implied Condition.

The plaintiff bought a horse of the defendant warranted quiet to ride. One of the conditions of the contract was to the effect that if the buyer contended that the horse did not correspond with the warranty it must be returned on the second day after the sale, and that the non-return within the time limited should be a bar to any claim on account of any breach of warranty.

The horse was removed by the plaintiff, and while being ridden, fell, and was so injured that it could not safely be returned on the second day after the sale, but the plaintiff gave notice to the defendant on that day that the animal was not according to warranty, and was unfit to travel:—

Held, that, under these circumstances, the non-return of the horse within the period stipulated by the condition was no bar to an action for breach of the warranty.

APPEAL from Marylebone County Court.

Action for breach of warranty. At the trial it appeared that on April 20, 1887, the plaintiff attended a sale by auction held at the horse repository called "Aldridge's," and there bought a horse warranted "quiet to ride," and subject to the conditions of sale following, *inter alia*: "4. Any horse sold at this establishment with a warranty must in case the buyer contend that it does not correspond with such warranty, be returned before 5 o'clock P.M. on the second day after the sale (Sunday excluded), otherwise it shall be deemed and taken to be in all respects as warranted as between all persons, and the non-return within the time limited shall be a bar to any claim on account of any breach of warranty, and the buyer shall be bound to keep and pay for the horse, whether it be or be not according to the warranty.

"5. Should a horse warranted quiet in harness or to ride be returned, it shall be tried by an impartial person to be named by the proprietors of this establishment, whose decision shall be final and conclusive upon all persons, and a fee of ten shillings for the trial shall be paid by the party in error."

The horse was sent by the plaintiff to Eastbourne on the same day. On the next day, April 21, the horse was tried by a riding master. It ran away, fell, and broke its shoulder bone. On April 22, the plaintiff telegraphed to the auctioneers that

the horse did not answer the warranty. They replied by telegram "The horse must be here before 5 to-day for return." The plaintiff answered that the horse was unfit to travel. The horse was on the next day still totally unfit to travel. It was ultimately killed. The plaintiff was referred by the auctioneers to the defendant, the owner of the horse, who, in answer to the action for breach of warranty, relied on the conditions.

The county court judge found that (1) the trial of the horse had been proper; (2) the horse was not "quiet to ride" as warranted; (3) the horse could not have been safely returned on the second day after the sale, and, that if it had been so returned, it would have been probably to the detriment of the vendor; and (4) notice of the non-correspondence of the horse with the warranty given at the sale was sent in due time on such second day, and the judge assessed the damages at 42*l.* After argument of the question whether the plaintiff was barred of his action by the conditions of sale the judge held that he was not, and gave verdict and judgment for the plaintiff.

Gully, Q.C., and *Thomas Terrell*, for the defendant. The plaintiff is bound by his contract and cannot recover for breach of warranty, because he has not returned the horse according to the express condition. In *Head* v. *Tattershall* (1), where there was a similar condition for return, Bramwell, B., did indeed express a doubt whether, if the horse was actually dead, mere notice of rejection would not suffice; but, except for that suggestion, there is no authority to shew that "return" in such an agreement means anything but physical return of the animal. The non-return is a bar to the action: *Hinchcliffe* v. *Barwick.* (2)

The return of the horse may have been difficult; but the difficulty arose from the plaintiff unreasonably removing the animal to a long distance from London before trying it, and the difficulty, and even impossibility, of returning it would not excuse the performance of the condition, because the contingency of accident might have been provided against in the agreement, on the principle laid down in *Paradine* v. *Jane* (3), recognised

(1) Law Rep. 7 Ex. 7.

(2) 5 Ex. D. 177.

(3) Aleyn, 27.

1888

CHAPMAN v. WITHERS.

Atkinson v. *Ritchie* (1), *Spence* v. *Chodwick* (2), and other cases. The only exception is where there is an implied condition as to the continued existence of the subject-matter of the contract at the time for performance, and it has ceased to exist: *Taylor* v. *Caldwell* (3); *Appleby* v. *Myers*. (4) But that exception has never been extended to the case where the performance of the contract was merely difficult or dangerous.

Robert Wallace, for the plaintiff, was not heard.

LORD COLERIDGE, C.J. I think that the condition as to the return of the horse was subject to the well-known rule that such agreements imply the continued existence of the subject-matter of the agreement. The result of the accident was to disable the animal so completely as to destroy it as a horse for all purposes of draught and riding. It became useless, and a mere mass of flesh and bones. To send back the carcass reduced to that state would have been futile. The learned counsel could hardly have contended that, if the horse had been killed outright by the accident, the dead body must nevertheless have been returned.

I think the county court judge came to a right conclusion in law. The rule must be discharged.

MATHEW, J. I am entirely of the same opinion. It is said that the rights of the plaintiff depend on the contract entered into. That is true. But what was the contract? The learned counsel for the defendant said that the contract was that the plaintiff should have no right to recover for breach of warranty unless the horse was returned alive or dead within the period stipulated for. Was that the contract? No reason is suggested for it. We look to see what was the object of the condition. The horse was to be returned for the purpose of trial, and for that purpose only. The evidence is that this horse could only have been returned in a condition in which no trial would have been of any use. The animal could only be destroyed. The continued existence of the animal as a horse which could be ridden or used had ceased, and, with that, the obligation to

(1) 10 East, 530.
(2) 10 Q. B. 517.
(3) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(4) Law Rep. 2 C. P. 651.

return it had ceased. Therefore it is clear that the plaintiff is not precluded from maintaining an action for the breach of warranty.

1888

CHAPMAN v. WITHERS.

Rule discharged.

Solicitors for plaintiff: *Flux, Son, & Co.*

Solicitor for defendant: *Collison.*

W. R.

[CROWN CASE RESERVED.]

April 26.

THE QUEEN *v.* WEALAND.

Criminal Law—48 & 49 *Vict. c.* 69, *s.* 4—*Indictment for carnally knowing Girl under Thirteen—Unsworn Evidence of—Conviction under s.* 9 *for Indecent Assault.*

The prisoner was indicted under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, for unlawfully and carnally knowing a girl under the age of thirteen years. The child, not understanding the nature of an oath, gave her evidence under the above section without being sworn. The jury acquitted the prisoner of the charge under s. 4, but, by virtue of the power given to them in s. 9, found him guilty of an indecent assault. Apart from the girl's testimony the evidence was insufficient to support the conviction. The Act contains no provision rendering unsworn evidence admissible on an indictment for indecent assault:—

Held, that the conviction was right.

CASE stated for the opinion of the Court by Hawkins, J. The prisoner was tried before the learned judge upon an indictment under s. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), for unlawfully and carnally knowing Eliza Wheal, a girl under the age of thirteen years, to wit, of the age of five years and nine months. The evidence of Eliza Wheal was received, though not given upon oath, under the provision in s. 4, and she was corroborated as therein required.

The jury acquitted the prisoner of the charge under s. 4, but found him guilty of an indecent assault under s. 9.

Without the girl's evidence the evidence would have been insufficient to justify a conviction.

In the statute there is nothing to make the evidence of the girl admissible without oath upon a simple indictment for indecent assault.

The question was whether the conviction could, under the circumstances, be supported.

No counsel appeared in the case.

1888

THE QUEEN v. WEALAND.

LORD COLERIDGE, C.J. We are all of opinion that the conviction was right. The prisoner was acquitted of the offence for which he was indicted under 48 & 49 Vict. c. 69, s. 4, but by s. 9 the jury might on the trial of such an indictment find him guilty of an indecent assault, and they did so. But s. 9 contains no provision enabling the evidence of a child who does not understand the nature of an oath to be given. The consequence is in this case, and may be in many others, somewhat anomalous, for it follows from the legislation that if a person is indicted for the graver offence under s. 4, and by virtue of that section unsworn evidence is given in support of the charge, he may be acquitted of it and yet found guilty, on the unsworn evidence, of the lesser offence, whereas if he had been indicted under the Act for the lesser offence, the evidence most material to his conviction could not have been given. This consequence was probably not contemplated by the legislature. It is an anomaly which may lead to a prisoner being indicted for the graver offence under s. 4, when it is known that he can only be convicted of a less offence under s. 9, on unsworn evidence given in support of the charge under s. 4. This is an unsatisfactory state of the law, which I hope will be remedied; but it does not affect the question before us, viz., whether on the words of the statute the conviction was right. We have no doubt that the evidence given under s. 4 was admissible, even although the conviction was not obtained under s. 4, but was obtained under s. 9.

MANISTY, J. I am of the same opinion, entirely, for the reason given by my Lord, that the statute has so provided. It is, no doubt, anomalous that a man may be convicted of an offence on evidence which if he had been indicted for that offence alone could not have been received.

HAWKINS, J. I am of the same opinion. I only reserved the point because I found that there were conflicting opinions on it, and I thought it well that the question should be settled.

MATHEW, J., and A. L. SMITH, J., concurred.

Conviction affirmed.

J. R.

THE QUEEN *v.* OWEN.

1888
April 26.

Criminal Law—48 & 49 *Vict. c.* 69, *s.* 20—*Indictment for Indecent Assault and Common Assault—Evidence of Prisoner—Conviction for Common Assault only.*

The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 20, renders a person charged with an indecent assault a competent witness on the hearing of such charge, but does not apply to a charge of common assault. The prisoner was tried on an indictment containing two counts, one for an indecent assault, and another for a common assault, and, on the hearing, gave evidence on oath in his defence. He was acquitted of the charge of indecent assault, but convicted of the common assault:—

Held, that his evidence being legally admissible, the conviction was right.

CASE stated by the deputy chairman of Worcester Quarter Sessions.

The prisoner was tried on an indictment containing two counts —(1) for unlawfully and indecently assaulting the prosecutrix; (2) for a common assault upon her.

The prosecutrix gave evidence that the prisoner put his arms round her and tried to put his hand up her clothes against her will. Her husband also gave evidence that he accused the defendant of indecently assaulting her, and he said that he was very sorry; he only put his hands on her. The prisoner gave evidence on oath in his defence under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), and, being sworn, admitted that he had put his arm round the prosecutrix, but denied that he had indecently or otherwise assaulted her.

The deputy chairman directed the jury that in any case there was clear evidence of a common assault; that the question of an indecent assault depended on whether the jury believed the prosecutrix or the defendant; if they believed the prosecutrix there was ample evidence in law to convict the defendant of an indecent assault; but it was for them to say if they thought an indecent assault, or only a common assault had been committed.

The jury acquitted the prisoner of indecent assault, but convicted him of a common assault.

The question was: whether on an indictment for an indecent assault, which contains a count for a common assault, after the

1888

THE QUEEN v. OWEN.

prisoner is called as a witness for the defence under 48 & 49 Vict. c. 69, s. 20, he can be legally convicted of a common assault only.

R. Harington, for the prisoner. The prisoner is not a competent witness on a charge of common assault. The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 20, renders him competent as a witness only when charged with an offence under that Act, or under ss. 48 & 52 to 55 inclusive of 24 & 25 Vict. c. 100. Sect. 47 of 24 & 25 Vict. c. 100 which relates to common assaults is not amongst those sections. "Where there are two counts in an indictment they are to all intents and purposes two separate indictments; and although the same jury are sworn to find the truth on both, it is as if two juries were trying two indictments," per Blackburn, J.: *Latham* v. *Reg.* (1) The fact that a count on which the prisoner's evidence was admissible was joined with a second count on which it was not admissible, cannot render it admissible on that second count: *Reg.* v. *Fuidge.* (2) The prisoner's evidence ought not to have been considered on the second count, and if the chairman had withdrawn that evidence from the jury, the prisoner could not have been convicted, for the evidence of the prosecutrix was of an indecent assault, and that was negatived by the jury. Several misdemeanors may be joined in one indictment, but suppose a count for false pretences were joined with a count for indecent assault, surely the evidence of the prisoner on the indecent assault would be inadmissible on the charge of false pretences. Evidence not legally admissible having been left to the jury, the conviction is bad: *Reg.* v. *Gibson.* (3)

R. H. Amphlett, for the prosecution, was not heard.

LORD COLERIDGE, C.J. The conviction must be affirmed. The direction to the jury would, perhaps, have been more complete if the learned chairman had told them that the prisoner was only an admissible witness as to the indecent assault, and had no right to give evidence on the question as to the common assault, which they must determine without reference to his testimony. But I

(1) 33 L. J. (M.C.) 197, at p. 199. (2) 33 L. J. (M.C.) 74.
(3) 18 Q. B. D. 537.

am not sure that such direction was at all necessary, for the circumstances in which a prisoner in a case like this stands are now altered, and the cases cited which were prior to the Criminal Law Amendment Act, 1885, are rendered obsolete through the change in the law made by that Act. It is true that there is no right to examine a prisoner on oath except on an indictment for a charge to which the Act applies, but it is also true that admissions made by a prisoner not on oath might always be received as evidence against him. The prisoner has a right under the Act, on particular offences being charged against him, to go into the witness-box and make statements. In the course of giving evidence on oath, which the Act empowers him to do, he makes a statement, and I should say that, as he chooses to take advantage of the privilege which the Act has bestowed on him of giving evidence on oath, any admission or statement made by him in doing so must stand on the footing of any other admission prior to the Act. The law gives the sanction of an oath to his statement so made, and it must be taken for or against himself. But there is a further view; the chairman did certainly direct the jury that there were two cases—one of indecent assault, the other of common assault; and that the case of common assault was clear on the evidence, but, besides that, there was *evidence* of an indecent assault. The jury took the more lenient view, and found a common assault, on the proper evidence to which they were substantially confined by the chairman. It is clear that there was evidence apart from that of the prisoner. There was evidence also supplied by the prisoner who went into the witness-box voluntarily to make his statement, and having made it he cannot now turn round and say that it was not admissible at all. So, looking at the evidence without the prisoner's testimony or with it, there was abundant evidence to support the conviction.

MANISTY, HAWKINS, MATHEW, and A. L. SMITH, JJ., concurred.

Conviction affirmed.

Solicitor for the prosecution: *F. Brooke.*

J. R.

1888
May 5.

[IN THE COURT OF APPEAL.]

EX PARTE ALICE WOODHALL.

Practice—Appeal—Jurisdiction—"Criminal Cause or Matter"—Habeas Corpus—Extradition Proceedings—Extradition Act, 1870 (33 & 34 *Vict. c.* 52)—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66) *s.* 47.

The Queen's Bench Division having refused an application for a writ of habeas corpus made on behalf of a person who had been committed to prison under s. 10 of the Extradition Act, 1870, as a fugitive criminal accused of an extradition crime:—

Held, that the decision of the Queen's Bench Division was given in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and therefore that no appeal would lie to the Court of Appeal.

MOTION made on behalf of Alice Woodhall, by way of appeal from a decision of the Queen's Bench Division, for an order nisi for the issue of a writ of habeas corpus.

Alice Woodhall was brought before Sir James Ingham, the chief magistrate of the Bow Street Police Court, charged under the provisions of the Extradition Act, 1870 (33 & 34 Vict. c. 52), as a fugitive criminal accused of having committed forgery in New York.

The magistrate, upon the evidence appearing from depositions duly taken, under s. 14 of the Act, in New York, committed the accused, under s. 10 (1), to a prison in Middlesex.

An application was thereupon made on her behalf to a Divi-

(1) 33 & 34 Vict. c. 52, s. 10: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged."

By s. 11: "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus."

By s. 26: "The term 'extradition crime' means a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to this Act;" and in the first schedule "forgery" is one of the crimes specified.

sional Court for an order nisi for the issue of a writ of habeas corpus to be directed to the keeper of the prison, on the ground that the magistrate, at the hearing of the case, had declined to adjourn it in order that evidence in favour of the accused obtained from New York, which evidence was expected to arrive in England shortly, might be tendered on her behalf; and that upon the evidence before the magistrate he ought not to have committed her.

The Divisional Court (Field and Wills, JJ.) refused to grant an order nisi on those points, and the applicant now moved by way of appeal from their decision.

Finlay, Q.C. (*David,* with him), for the applicant. This Court has jurisdiction to hear the motion. By s. 19 of the Judicature Act, 1873, the Court of Appeal "shall have power to hear appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any judges or judge thereof." The exception from the jurisdiction, which it is material to consider, is that contained in the last clause of s. 47, which provides that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save from some error of law apparent upon the record, &c." An application for a writ of habeas corpus is not a criminal cause or matter within the meaning of s. 47. By s. 100 "'cause' shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown"; and "'matter' shall include every proceeding in the Court not in a cause." An application for a writ of habeas corpus is a collateral matter, not necessarily having reference to any criminal proceeding. The primary object of such an application is to secure that the person who has detained the applicant shall produce him. In such a case an appeal lies from an order of the High Court, either granting or refusing the writ: *Ex parte Rev. James Bell Cox* (1). In *Reg.* v. *Justices of Central Criminal Court* (2), the Queen's Bench Division discharged a rule for a certiorari to remove an order for the restitution of goods obtained

(1) 20 Q. B. D. 1. (2) 18 Q. B. D. 314.

1888

EX PARTE ALICE WOODHALL.

by false pretences after the conviction of the prisoner for that offence. In *Reg.* v. *Foote* (1) the appeal was from a refusal of the Queen's Bench Division to admit a prisoner to bail: and in *Reg.* v. *Steel* (2) the appeal was from the decision of the Queen's Bench Division discharging a rule to review the taxation of the costs of the trial of an information for libel, where the defendants succeeded. In each of those cases the matter in respect of which the decision appealed from was given was clearly criminal, so that the judgments of the Court of Appeal in each of them do not apply to this case.

It is also contended that the words "criminal cause or matter" were meant only to apply to criminal causes or matters triable in England, i.e., over which the Courts of this country have cognizance.

[As the Court of Appeal decided the case on the question of jurisdiction, it is unnecessary to state the arguments of counsel with respect to whether the magistrate was justified, upon the evidence before him, in committing the applicant to prison.]

LORD ESHER, M.R. In this case a Divisional Court refused to grant an order nisi for a writ of habeas corpus with respect to a person in custody, who had been brought before Sir James Ingham for the purpose of obtaining a warrant for her extradition to America. The applicant appealed to this Court, and the first question which arises is whether we have any jurisdiction to hear the appeal. That depends upon whether or not the appeal is from a decision of the Queen's Bench Division in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873. If the decision is brought within those words in s. 47, it is clear that no appeal will lie to this Court. The question, how wide an interpretation the latter part of s. 47 ought to receive, has been before this Court on former occasions. In *Reg.* v. *Weil* (3), the Court, composed of the late Master of the Rolls, Lord Justice Cotton, and myself, declined to decide whether in a case like the present one an appeal would lie. We

(1) 10 Q. B. D. 378. (2) 2 Q. B. D. 37.

(3) 9 Q. B. D. 701.

refused the application for a writ of habeas corpus upon the facts, but gave no opinion on the question of jurisdiction. We might dispose of the present case in the same way, because we are all of opinion that, if we had jurisdiction to grant the rule nisi for a writ of habeas corpus, we ought not to grant it upon the facts which have been brought before us. But we consider that we ought not any longer to flinch from determining whether we have, or have not, jurisdiction to hear an appeal in such a case as this; and we desire to rest our decision, not upon the facts of the particular case, but upon the determination of the question of jurisdiction.

The result of all the decided cases is to shew that the words "criminal cause or matter" in s. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any "criminal matter" in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes and matters. The meaning of the words "criminal cause or matter" was considered in various cases which have been cited, but the case which helps one most to the true construction is, I think, *Reg.* v. *Fletcher* (1), following *Reg.* v. *Steel.* (2) In *Reg.* v. *Fletcher* (1) the appeal was from a decision of the Queen's Bench Division discharging a rule for a certiorari to bring up for the purpose of quashing a summary conviction by justices. The Court of Appeal held that the appeal was from a judgment of the High Court in a criminal matter within the last clause of s. 47. Mellish, L.J., said: "In *Reg.* v. *Steel* (2) we held that clause was not confined, as was contended, to the High Court when sitting as the Court to hear points reserved in criminal cases, but extended to all criminal cases in the High Court, and therefore to criminal cases in the Queen's Bench Division. The question here is somewhat wider—whether the exemption from appeal extends to a proceeding in the Queen's Bench Division, which might be said to be not strictly a criminal proceeding in that court, but was a proceeding taken in that court for the purpose of quashing a conviction before justices which was clearly a criminal proceeding. Was that proceeding in the Queen's

(1) 2 Q. B. D. 43 (2) 2 Q. B. D. 37.

1888

EX PARTE ALICE WOODHALL.

Lord Esher, M.R.

Bench Division a proceeding in a criminal matter? Now the intention of the legislature appears to me clearly to have been to leave the procedure in criminal cases substantially unaltered." He held that the proceeding was in a criminal matter; and he proceeded to say that he had no doubt the clause—"No appeal shall lie from any judgment of the said High Court in any criminal cause or matter," was intended to refer to all criminal matters whatever coming before the High Court. I said: "In the present case it is said that the judgment must be confined to a judgment in a criminal cause or matter in the High Court itself, and does not extend to a proceeding in a case which has not its inception in the High Court. I cannot agree to that. I should read the clause as meaning 'no appeal shall lie from any decision of the High Court by way of judgment in any criminal cause or matter.'" In the present case, I think I must try to express my meaning in other words. I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises. Applying that proposition here, Was the decision of the Queen's Bench Division, refusing the application for a writ of habeas corpus, a decision by way of judicial determination of a question raised in or with regard to the proceedings before Sir James Ingham? I am clearly of opinion that it was, and I think it is impossible to say that what took place before him was not a proceeding the subject-matter of which was criminal. If the proceeding before the magistrate was a proceeding the subject-matter of which was criminal, then the application in the Queen's Bench Division for the issue of a writ of habeas corpus, which if issued would enable the applicant to escape from the consequences of the proceeding before the magistrate, was a proceeding the subject-matter of which was criminal. It follows, therefore, that this Court has no jurisdiction to hear the appeal. It does not follow that this Court would have no jurisdiction to hear any appeal with respect to the granting or refusing of a writ of habeas corpus. If the subject-matter of the proceedings in respect of which the application

was made was criminal, this Court would have no jurisdiction to hear the appeal. If such subject-matter was not criminal this Court would have jurisdiction. As I have said, our real and binding decision in this case is that we have no jurisdiction to grant the order. The motion must, therefore, be dismissed.

LINDLEY, L.J. I am of the same opinion. Whether one regards the language of s. 47, or the cases which have been decided upon the construction of it, the result is precisely the same. The true construction is that put by Mellish, L.J., in *Reg.* v. *Steel.* (1) The question in that case was with respect to the taxation of the defendant's costs in a prosecution for libel, and the doubt which arose, and was dissipated, was whether s. 47 excepted all criminal matters, or whether its application was limited to appeals from judgments of the High Court, when sitting as a Court for Crown Cases Reserved. Mellish, L.J., said: "No doubt the first part of the section refers to the Court for Crown Cases Reserved; but it goes on and says that 'no appeal shall lie from any judgment of the said High Court in any criminal cause or matter.' Are you to confine this to the Court for Crown Cases Reserved, or is it general, extending the exception or exemption from appeal to all criminal causes or matters? I am clearly of opinion that it is general; and that the saving clause was necessary to retain the former rights of appeal for error on the record. If this were not so there would be an appeal from the Court of Queen's Bench, not only on every judgment, but on any order in a criminal case. The intention of the latter part of s. 47 was to prevent this; and there appears no reason, but the contrary, why the words 'no appeal shall lie from any judgment of the said High Court in any criminal cause or matter,' should be confined, as the appellants contend, to the High Court when sitting as a Court for the consideration of Crown Cases Reserved." That construction put upon the words of the Act in 1876, has been continued in the subsequent cases. Can we say that the application in the present case is not an application in a criminal cause or matter? I think that in

(1) 2 Q. B. D. 37.

1888

EX PARTE ALICE WOODHALL.

Lindley, L.J.

substance it certainly is. Its whole object is to enable the person in custody to escape being sent for trial in America upon a charge of forgery. I am of opinion that we have no jurisdiction to entertain the matter; but it does not follow that we have no jurisdiction to entertain other appeals from decisions of the High Court upon applications for the issue of writs of habeas corpus, where—and there are plenty of such cases—the application is not made with respect to any criminal cause or matter.

BOWEN, L.J. I am of the same opinion. I agree that we ought now to decide the question of jurisdiction in the interests of justice, and not to leave persons subject to extradition proceedings in uncertainty as to whether such an appeal as this can be brought.

Whether we have jurisdiction or not depends upon whether the decision of the Queen's Bench Division was a judgment in a criminal cause or matter within s. 47. That decision was given in an application to obtain the discharge from custody of a person committed under s. 10 of the Extradition Act, 1870. It is necessary to look at that section in order to see how she came to be committed. The section in terms is to apply "in the case of a fugitive criminal accused of an extradition crime." It must therefore be the case of a person who has fled from foreign justice; and the crime of which he is accused must be one of those specified in the schedule which would be a crime according to the law of this country. The magistrate is charged with the duty of considering, upon the evidence before him, whether that evidence is sufficient according to English law to justify the committal for trial of the accused person. How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law, and competent to decide what is sufficient evidence to justify a committal. The questions upon which the application for a writ of habeas corpus depend, are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient

to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of habeas corpus is a judgment in a criminal matter. I will only add that upon the facts of this case I entirely agree that we ought not to interfere with the magistrate's order.

Motion dismissed.

Solicitors for applicant: *Brooks & Co.*

W. A.

END OF VOL. XX.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1888, will be as follows:—

In the First Series,
37 Ch. D.

In the Second Series,
20 Q. B. D. 13 P. D.

In the Third Series,
13 App. Cas.

INDEX.

ABATEMENT—Marriage—Breach of promise of —Action against personal representatives of promisor—Survival of cause of action—Special damage - - 494
See MARRIAGE.

ADMINISTRATION — Deceased debtor — Bankruptcy — Attachment of debts — Order affecting rights of strangers — Jurisdiction - - - - 38
See BANKRUPTCY.

ADULTERATION — *Scienter—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.] By s. 6 of the Sale of Food and Drugs Act, 1875, "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l.*":—*Held*, that an offence within that section was committed, although the seller did not know that the article sold was not of the nature, substance, and quality demanded. BETTS *v.* ARMSTEAD - - - - 771

ADULTERY—Connivance by husband—Liability of husband for necessaries supplied to wife - - - - - 354
See HUSBAND AND WIFE. 4.

AFTER-ACQUIRED PROPERTY—Bill of sale
See BILL OF SALE. 6. [569

AGISTMENT—Cattle—Privilege from distress—Agricultural Holdings Act, 1883 807
See LANDLORD AND TENANT.

ALIMONY—Order for payment of alimony pendente lite — Final judgment — Bankruptcy notice - - - 509
See BANKRUPTCY. 4.

AMENDMENT — Inquisition — Persons charged with murder or manslaughter - 410
See CORONER.

APOTHECARY—Trader—Bankruptcy - 732
See BANKRUPTCY. 14.

APPEAL—Bankruptcy—Refusal of Court to order witness to answer questions—Party to appeal - - - - 518
See BANKRUPTCY. 15.

APPEAL—*continued.*

—— County Court—Dispute between members of friendly society and its officers - 423
See COUNTY COURT. 2.

—— County Court—Interlocutory order—Equitable jurisdiction - - - 564
See COUNTY COURT. 3.

—— County Court—Interpleader—Amount not exceeding 20*l.* - - - 202
See COUNTY COURT.

—— Court of Appeal—Habeas corpus—Extradition—"Criminal cause or matter"
See PRACTICE. 4. [832

—— Court of Appeal — Lands Clauses Act — Costs incidental to arbitration—Special case—Jurisdiction over costs - 699
See WATERWORKS.

—— Patent—Certificate of validity—Judicature Act, s. 19 - - - - 491
See PRACTICE. 11.

—— Practice—Appeal to Court of Appeal—Habeas corpus - - - 1
See ECCLESIASTICAL LAW. 3.

—— Security for costs—Abuse of the process of the Court - - - - 331
See PRACTICE. 5.

—— Small bankruptcy—Practice - - 341
See BANKRUPTCY. 8.

—— Special sessions—Valuation Acts—Metropolis — Provisional list — Assessment committee - - - - 749
See METROPOLIS.

APPURTENANCES — Right of way—Grant by general words - - - 225
See EASEMENT.

ARBITRATION—*Arbitration Clause—Fire Insurance—Proviso against suing before Arbitration—Condition Precedent.*] In an action on a fire policy the defendant pleaded that the policy was made subject to a condition that, if any difference should arise in the adjustment of a loss, the amount to be paid should be submitted to arbitration, and the insured should not be entitled to

ARBITRATION—*continued.*

commence or maintain any action upon the policy until the amount of the loss should have been referred and determined as therein provided, and then only for the amount so determined, that a difference had arisen, and the amount had not been referred or determined:—*Held*, that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy, and the defence was an answer to the action.—*Collins* v. *Locke* (4 App. Cas. 674) distinguished. VINEY *v.* BIGNOLD - - 172

2. —— *Costs—Mercantile Reference—Implied Contract to pay Arbitrators and Umpire reasonable Remuneration.*] The parties in a mercantile dispute agreed to refer their differences to arbitrators (who were not in the legal profession), or in case of disagreement to their umpire. The arbitrators disagreed, and appointed an umpire who made his award.—*Semble, per* A. L. Smith, J., that there was an implied contract by the parties jointly to pay the arbitrators and umpire reasonable remuneration for their services. CRAMPTON & Co. *v.* RIDLEY & Co. - - 48

3. —— *Staying Proceedings—General Agreement to refer future Disputes—Submission to particular Arbitrators—Revocation, Effect of—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11.] An arbitration clause in an agreement between the plaintiffs and the defendant provided that, if any dispute should arise between the parties touching that agreement, the dispute should be referred to two named arbitrators, or their umpire, the provisions of the Common Law Procedure Act, 1854, to apply to the reference. A dispute having arisen in respect of moneys alleged to have become due and payable from the defendant to the plaintiffs under the agreement, the defendant gave notice to proceed to arbitration. The plaintiffs thereupon brought an action for the moneys and revoked their submission to the arbitrators:—*Held*, that the defendant was not entitled to have the proceedings in the action stayed under s. 11 of the Common Law Procedure Act, 1854, because after the plaintiffs' revocation of the submission, there was, in respect of the particular dispute which had arisen, no subsisting agreement to refer capable of being carried into effect. DEUTSCHE SPRINGSTOFF ACTIEN GESELLSCHAFT *v.* BRISCOE - - - - 177

—— Local Government Acts—Invalid appointment of arbitrators—Award - 368
See LOCAL GOVERNMENT ACTS. 2.

ARCHBISHOP—Convocation—Election of proctor—Mandamus - - - 740
See ECCLESIASTICAL LAW. 4.

ARTIZANS' AND LABOURERS' DWELLINGS ACT, 1868 (31 & 32 *Vict. c.* 130), *s.* 3—"*Owner*," *Definition of—Time when Ownership to be ascertained.*] By various sections of the Artizans' and Labourers' Dwellings Act, 1868, notices of all proceedings, &c., under the Act are directed to be served upon the "owner" of the premises which are being dealt with by the local authority; by s. 3 "owner" is to include "all lessees or mortgagees of any premises required to be dealt with under this Act, except persons holding or entitled to the rents and profits of such premises

ARTIZANS' AND LABOURERS' DWELLINGS ACT, 1868—*continued.*

for a term of years, of which twenty-one years do not remain unexpired."—In July, 1886, the tenant of premises was possessed of them as assignee of a lease expiring at Michaelmas, 1886, and was also the assignee of another lease of the same premises for twenty-one years, commencing on the expiration of the first lease. In the same month the vestry, in the exercise of their powers under the Act, caused copies of the reports of their officer of health and their surveyor, with a notice of the time and place appointed for their consideration, to be served upon the tenant, as being the "owner," under s. 7 of the Act. In the following October an order was made by the vestry for the demolition of the premises. The work required was done by the tenant, who upon its completion applied to and obtained from the vestry a charging order upon the premises:—*Held*, that although the interest of the tenant in the new lease was in law only an interesse termini, he had such an interest in the premises at the time when the proceedings were initiated by service of the notice upon him as to make him the "owner" within the meaning of the section:—*Held*, also, that the point of time to be looked at in order to determine the ownership for the purposes of the Act was the date of the service of the notices and not of the making of the order for demolition. THE QUEEN *v.* VESTRY OF ST. MARYLEBONE - - - - - 415

ARRANGEMENT, SCHEME OF—Bankruptcy—Consent by debtor that trustee shall enter judgment against him for full amount of debts - - - 258
See BANKRUPTCY. 17.

—— Scheme of—Approval of Court—Sale of assets without the jurisdiction - 544
See BANKRUPTCY. 18.

ASSESSMENT COMMITTEE—Valuation Acts—Provisional list—Special sessions—Appeal - - - - 749
See METROPOLIS.

ATTACHMENT OF DEBTS—Bankruptcy—Deceased debtor—Administration of estate—Order affecting right of strangers—Jurisdiction - - - - 38
See BANKRUPTCY.

—— Payment by garnishee under void judgment—Trustee in bankruptcy—Money received to use of - - - 321
See PRACTICE. 9.

—— Garnishee order absolute against judgment debtor as garnishee—Bankruptcy notice
See BANKRUPTCY. 6. [690

BANKRUPTCY—*Act of Bankruptcy—Assignment of Property to Trustee for the Benefit of Creditors generally—Right of Party to the Assignment to prove in Bankruptcy—Release—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52, *s.* 4, *sub-s.* (*a*), *s.* 43.] The debtor executed an assignment of his property to a trustee for the benefit of his creditors. The deed provided for the distribution of the assets by the trustee rateably among all the creditors, and contained a covenant by which "in

BANKRUPTCY—*continued.*

consideration of the premises," the creditors, parties to the deed, agreed to "release the debtor from all claims and demands" against him. The debtor was adjudicated bankrupt upon the petition of a non-executing creditor, the act of bankruptcy proceeded upon being the execution of the deed:—*Held*, that the deed sufficiently shewed that the release was not intended to bind the executing creditors in the event of bankruptcy, and that they were entitled to prove. IN RE STEPHENSON. EX PARTE THE OFFICIAL RECEIVER - 540

2. —— *Deceased Debtor—Administration of Estate—Order affecting Rights of Stranger—Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.] A county court judge sitting in bankruptcy has no jurisdiction, unless by consent, to order payment to the official receiver of money received under a garnishee order attaching a debt due to the estate of a deceased debtor which is being administered according to the law of bankruptcy under s. 125 of the Bankruptcy Act, 1883. IN RE CROWTHER. EX PARTE ELLIS - 38

3. —— *Bankruptcy Notice—Final Judgment—Order for Dismissal of Action for want of Prosecution—Order XXVII., r.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] In an action in the Chancery Division, the defendant obtained under Order XXVII., r. 1, an order for the dismissal of the action for want of prosecution and the payment of the costs by the plaintiff:—*Held*, that the order for the payment of the costs was not a "final judgment" within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and that the defendant was not entitled to serve the plaintiff with a bankruptcy notice in respect of such order. IN RE RIDDELL. EX PARTE EARL OF STRATHMORE - - - - 318

4. —— *Bankruptcy Notice—"Final Judgment"—Order for Payment of Alimony pendente lite—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 52.] An order for the payment of alimony pendente lite is not a "final judgment" against the husband within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued against the husband in respect of arrears due under such an order.—*Ex parte Moore* (14 Q. B. D. 627) distinguished. IN RE HENDERSON. EX PARTE HENDERSON - - - C. A. 509

5. —— *Bankruptcy Notice — Act of Bankruptcy—"Final Judgment"—Order for Dismissal of Action for want of Prosecution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] In an action in the Chancery Division the defendant obtained under Order XXVII., r. 1, an order for the dismissal of the action for want of prosecution, and the payment of costs by the plaintiff:—*Held*, affirming the judgment of the Queen's Bench Division, that the order was not a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, and that the defendant was not entitled to serve the plaintiff with a bankruptcy notice in respect of such order. IN RE RIDDELL. EX PARTE EARL OF STRATHMORE - - - - C. A. 512

BANKRUPTCY—*continued.*

6. —— *Bankruptcy Notice — "Final Judgment" — Stay of Execution — Garnishee Order absolute against Judgment Debtor as Garnishee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Rules of Supreme Court*, 1883, *Order XLII., rr.* 22, 23.] Where a creditor has obtained final judgment and a garnishee order absolute has been made against the judgment debtor as garnishee, execution on the judgment must be taken to be stayed so long as the garnishee order remains undischarged, and the creditor is not entitled to serve a bankruptcy notice on the garnishee in respect of the judgment debt, even though the debt in respect of which the garnishee order was made has been in fact paid. IN RE CONNAN. EX PARTE HYDE - - - C. A. 690

7. —— *Petitioning Creditor's Debt—Amount—Judgment Debt—Costs of issuing abortive Execution—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6—*Rules of Supreme Court*, 1883, *Order XLII., r.* 15.] The costs of an abortive execution cannot be added to the judgment debt for the purpose of making up the amount of debt required by the Bankruptcy Act, 1883, s. 6, to support a bankruptcy petition. IN RE LONG. EX PARTE CUDDEFORD - - - - C. A. 316

8. —— *Practice—Appeal—Small Bankruptcy—Application for Discharge — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104, *sub-s.* 2, 121, *sub-s.* 3—*Bankruptcy Rules*, 1886, *r.* 273 (6).] Rule 273 (6) of the Bankruptcy Rules, 1886, which provides that in small bankruptcies no appeal shall lie from any order of the Court except by leave of the Court, does not preclude the debtor from appealing, without leave, against a refusal to grant him his discharge. IN RE RANKIN. EX PARTE RANKIN - - - - 341

9. —— *Husband and Wife—Married Woman—Separate Estate—Debt contracted after Marriage—Non-Trader—Bankruptcy Notice—Liability to Bankrupt Law—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5—*Bankruptcy Act*, 1883, *s.* 4, *sub-s.* 1 (*g*), *s.* 152.] A married woman, possessed of separate estate, but not carrying on a trade separately from her husband, is not subject to the operation of the bankruptcy laws, and cannot commit an act of bankruptcy under s. 4 of the Bankruptcy Act, 1883. IN RE GARDINER. EX PARTE COULSON 249

10. —— *Costs—Sheriff—Execution—Expenses incurred for Benefit of Property seized—Costs of Execution—Charge on Goods—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 46, *sub-s.* 1.] Expenses incurred by a sheriff for the cost of cutting, carrying, threshing, and dressing corn which has been taken in execution, are not "costs of the execution" within the meaning of s. 46, sub-s. 1, of the Bankruptcy Act, 1883, and therefore if before sale notice of a receiving order against the execution debtor is served on the sheriff, and the goods are delivered to the official receiver or trustee, such expenses are not a charge on the goods, and must be disallowed on taxation of the sheriff's costs. IN RE WOODHAM. EX PARTE CONDER - - - - - 40

11. —— *Disclaimer—Bankrupt Lessee—Mortgage by sub-demise—Vesting Order—Exclusion—*

BANKRUPTCY—*continued.*

Application by Lessor — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6.] A lessee mortgaged the leasehold property by sub-demise, and was subsequently adjudicated a bankrupt. The trustee obtained leave to disclaim, and thereupon the lessor applied for and obtained an order, under s. 55, sub-s. 6, of the Bankruptcy Act, 1883, that the mortgagee should be excluded from all interest in and security upon the property, unless within seven days he elected to accept an order vesting in him the disclaimed property subject to the same liabilities and obligations as the bankrupt was subject to under the lease:—*Held*, that the order excluding the mortgagee's interest unless he accepted the terms proposed could be made upon the application of the lessor.—BY THE COURT:—If the mortgagee refused to accept a vesting order on the terms offered by the order of the Court, it was competent for the Court to order that the property be vested in or delivered to the lessor.—*Ex parte Turquand* (14 Q. B. D. 405) discussed. IN RE COCK. EX PARTE SHILSON - - - - - 343

12. —— *Practice—Security for Costs—Proof by Creditor resident Abroad—Bankruptcy Rules*, 1883, *rr.* 131, 148.] The Court has no jurisdiction to order a creditor resident abroad, who is appealing from the rejection of his proof by the trustee, to give security for the costs of such appeal. IN RE VANDERHAEGE. EX PARTE IZARD [146

13. —— *Void Settlement—Costs of Trustees of Settlement—Lien on Trust Fund — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.] Trustees of a settlement, originally valid, but which becomes void on the bankruptcy of the settlor, are entitled as against the trustee in bankruptcy to a lien on the trust property for expenses properly incurred in the performance of their duty as trustees.—The settlor of a post-nuptial settlement brought an action to set it aside. The trustees of the settlement defended the action, which was dismissed with costs, but the costs were not paid.—The settlor became bankrupt within two years after the date of the settlement, which accordingly became void under s. 47 of the Bankruptcy Act, 1883.—*Held*, that, as the settlement was originally valid, and as the costs of the action had been incurred by the trustees in the performance of their duty as trustees, they were entitled, as against the official receiver, to a lien on the trust fund for such costs. IN RE HOLDEN. EX PARTE OFFICIAL RECEIVER - - - - 43

14. —— *Settlement by Trader—Purchaser for Valuable Consideration—Dealing with Bankrupt in Good Faith and for Valuable Consideration—Apothecary—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 91, 94.] By a post-nuptial settlement made in pursuance of an arrangement between the settlor and his father, the settlor assigned a policy of insurance upon his life to trustees on trusts for the benefit of his children, the settlor's father at the same time conveying certain leasehold property to the trustees on similar trusts. The transaction was entered into in good faith for the purpose of securing a provision for the children, and not with any intention to defraud or defeat the settlor's creditors. — The settlor having become bankrupt within two years from the date of the settlement and subsequently dying, the official receiver in bankruptcy claimed the money payable under the policy on the ground that the settlement was void under the 91st section of the Bankruptcy Act, 1869:—*Held*, that the settlement was valid, on the ground either that it was not within s. 91 of the Bankruptcy Act, 1869, the bankrupt's father being a purchaser in good faith for valuable consideration within that section, or that it was protected under s. 94, sub-s. 3, of the same Act, as being a dealing with the bankrupt by the father made in good faith and for valuable consideration without notice of any act of bankruptcy. (See ss. 47 & 49 of the Bankruptcy Act, 1883.)—*Ex parte Hillman, In re Pumfrey* (10 Ch. D. 622), discussed and explained.—A medical man practising as a general practitioner dispensed medicines to his patients but charged by the visit irrespectively of the medicine supplied, which was covered by the charge for the visit:—*Held*, that he was not a trader in drugs within the meaning of the Bankruptcy Act, 1869. HANCE *v.* HARDING C. A. 732

15. —— *Witness summoned for Examination respecting Property of Bankrupt — Refusal to answer Questions—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52, *s.* 27.] When a witness is summoned, under s. 27 of the Bankruptcy Act, 1883, for examination concerning the debtor's dealings or property, the judge is not bound to accept at once as conclusive the denial of the witness that he has dealt with such property, but the witness may be further questioned in order to test his credibility. —*Re Purvis* (56 L. T. (N.S.) 579) explained.—When an appeal is brought against the refusal of the Court to order a witness to answer questions put to him during his examination, the witness cannot be made a party to the appeal. IN RE SCHARRER. EX PARTE TILLY - - C. A. 518

16. —— *Removal of Disqualifications of Bankrupt—Certificate that Bankruptcy was caused by "Misfortune without any Misconduct" on the part of the Bankrupt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 32.] By s. 32 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), certain disqualifications are imposed upon a bankrupt, which are to be removed if he obtains from the Court his discharge, with a certificate that his bankruptcy was "caused by misfortune without any misconduct on his part." The debtor instituted a suit for a divorce against his wife and co-respondents on the ground of her adultery. At the trial the jury found that the wife had not committed adultery, and the petition was dismissed, and the debtor was ordered to pay the costs of his wife and of the co-respondents. The means of the debtor both before and after the commencement of the proceedings were wholly insufficient to pay these costs, and he was adjudged a bankrupt on the petition of one of the co-respondents:—*Held*, that the bankruptcy of the debtor had not been "caused by misfortune without any misconduct on his part" within the meaning of s. 32, and that he was not entitled to the certificate described in the section. IN RE LORD COLIN CAMPBELL - - - - C. A. 816

BANKRUPTCY—*continued.*

17. —— *Scheme of Arrangement—Approval of Court—Consent by Debtor that Trustee shall enter Judgment against him for full Amount of Debts to be enforceable as in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 28, *sub-s.* 6.] The provisions of sub-s. 6 of s. 28 of the Bankruptcy Act, 1883, cannot, by agreement between a debtor and his creditors, be incorporated into a scheme of arrangement of the debtor's affairs under s. 18, nor can a jurisdiction, similar to that which is conferred on the Court by sub-s. 6 in the case of a bankruptcy, be given to the Court by agreement between the debtor and his creditors in the case of a scheme of arrangement.—A scheme of arrangement of a debtor's affairs, accepted by his creditors under s. 18, provided that the debtor should, prior to the approval of the scheme, consent to judgment being entered against him by the trustee under the scheme for the full amount of the debts provable thereunder, such judgment to have the same effect, and to be enforceable in the like manner and to the like extent, as though the debtor had been adjudged bankrupt under the proceedings, and the Court had granted him an order of discharge conditional upon his consenting to judgment being entered against him by the trustee, and such judgment been entered accordingly:—*Held*, that as the judgment could not be enforced either at common law, or under the Act, or by agreement, the scheme, so far as it purported to give the judgment, was illusory and of no effect, and that it ought not to be approved by the Court. IN RE AYLMER. EX PARTE BISCHOFFSHEIM [C. A. 258

18. —— *Scheme of Arrangement—Approval of Court—Sale of Assets without the Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 6.] The debtors were merchants having a house in England and a house in South America. Assets of large amount, forming the principal part of the estate, were in South America without the jurisdiction. A scheme was proposed for the sale of these assets to one of the partners who resided in South America for about their estimated value, such partner agreeing to pay the purchase-money by quarterly instalments extending over four years. Under the scheme the trustee was to insure the purchaser's life for about one-sixth of the amount payable, but there was no other provision as to security. The scheme was recommended by the committee of inspection, who were creditors for a large amount, and by an accountant who, at their instance, had gone to South America and examined the affairs of the house there. The official receiver also made a report in favour of what was proposed. The county court judge refused to approve of the scheme:—*Held*, that the judge had exercised his discretion wrongly, and that the scheme ought to be approved by the Court as being reasonable and for the benefit of the general body of the creditors. IN RE STANIAR, ROBERTS, & CO. EX PARTE SMITH - - 544

—— Charging order—Rehearing—Jurisdiction *See* SOLICITOR. 3. [693

BILL OF LADING—Contract contained in—Evidence to vary terms of—Deviation—Loss by perils of the sea - - - 475 *See* SHIP.

BILL OF SALE—*Schedule—Inventory—Chattels "specifically described"—Sufficiency of Description—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 4.] By s. 4 of the Bills of Sale Act (1878) Amendment Act, 1882, every bill of sale must have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale, and it is to be void, except as against the grantor, in respect of any personal chattels not specifically described in the schedule.—A bill of sale was given by a picture dealer with regard to (among other things, as to which no question arose) pictures, &c., forming stock-in-trade. Such bill of sale purported to assign "all and singular the several chattels and things specifically described in the schedule hereto annexed." The description in the schedule was, "At 77, Mortimer Street; four hundred and fifty oil-paintings in gilt frames, three hundred oil-paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames":—*Held* (affirming the judgment of the Queen's Bench Division), that the bill of sale did not comply with the requirements of the above-mentioned section, and therefore was void as against an execution creditor so far as chattels claimed under the above description were concerned. WITT *v.* BANNER - - - C. A. 114

2. —— *Validity—Departure from Statutory Form—Mortgage of "Personal Chattels" and "Trade Machinery" not being "Personal Chattels" —Severance of Security—Partial Invalidity of Deed—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 5.] Where personal chattels and other property are mortgaged by a deed which is not made in accordance with the statutory form of a bill of sale, and is therefore, by s. 9 of the Bills of Sale Act, 1882, void as regards the "personal chattels," such deed is valid as to the other property comprised in it, if it is possible to sever the security upon the personal chattels from that upon the other property. — A deed assigned to the grantee as security for a debt "the several chattels and things specifically described" in a schedule to the deed. The schedule comprised "personal chattels," and also a gas engine, which did not come within the definition of "personal chattels" contained in s. 4 of the Bills of Sale Act, 1878. The deed was not made in accordance with the statutory form of bill of sale contained in the schedule to the Bills of Sale Act, 1882:—*Held*, that the deed was, under s. 9 of the Bills of Sale Act, 1882, void as to the "personal chattels," but that it remained valid as to the gas engine.—*Davies* v. *Rees* (17 Q. B. D. 408) explained and distinguished. IN RE BURDETT. EX PARTE BYRNE [C. A. 310

3. —— *Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Form in Schedule, Deviation from—"Sum thereby secured" —Covenant necessary for maintaining the Security.*] By a bill of sale given to secure the repayment of an advance with interest thereon at the rate of 40 per cent. per annum, by equal monthly payments of 4*l.* each until the whole of the principal money and interest should be paid, it was provided that, if the mortgagor did not pay

BILL OF SALE—*continued.*

the rent, rates, taxes and outgoings of the premises on which the goods assigned might be within seven days after the same should respectively become payable, the mortgagees might, if they thought fit, pay such rent, rates, taxes and outgoings, and all sums of money so paid by the mortgagees, together with interest thereon after the rate aforesaid, should be charged on the goods assigned, and should be recoverable in the same manner as the principal moneys and interest secured by the bill of sale; it was further provided that the goods assigned should be liable to seizure for any of the causes specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, but should not be liable to seizure for any other cause:—*Held*, that such bill of sale was void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, on the ground that it contained terms importing a power of seizure in contravention of the provisions of s. 7 of the Act.—*Bianchi* v. *Offord* (17 Q. B. D. 484) followed: *Ex parte Stanford, In re Barber* (17 Q. B. D. 259), and *Goldstrom* v. *Tallerman* (18 Q. B. D. 1), distinguished. Real and Personal Advance Company *v.* Clears - - - C. A. 304

4. —— *Validity—Terms agreed to for Maintenance of Security — Covenants necessary for maintaining Security—Power to seize — Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9.] The insertion in a bill of sale of terms agreed to by the parties for the maintenance of the security, but which are not necessary for maintaining the security within the meaning of s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, does not render the bill of sale void, provided power is not given to the grantee to seize the goods for default in the performance of any covenant or agreement not necessary for maintaining the security. Topley *v.* Corsbie - - - - - 350

5. —— *Affidavit — Accidental Omission of Particulars prescribed by the Act—Rectification of Omission—"The Register"—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-ss.* 2, 12, 14.] Sect. 14 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 31,—which enables a judge, on being satisfied that the omission or misstatement of the name, residence, or occupation of any person was accidental, &c., to order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation,—is limited by the description of "register" in s. 12, and the judge—where the affidavit filed with the registrar under s. 10, sub-s. 2, has by inadvertence omitted to describe the residence and occupation of an attesting witness—has no power to allow an affidavit to be filed supplying such particulars. Crew *v.* Cummings - 535

6. —— *Schedule—Inventory of Personal Chattels—"Specifically described"—After-acquired Property—Form of Bill of Sale—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 5, 9.] A bill of sale contained an assignment, by way of security for the payment of money, of the chattels specifically described in the schedule thereunto annexed "together with all other chattels and things, the property of the mortgagor, now in or about the premises, and also all chattels and things which may, at any time during the continuance of this security, be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to the chattels and things hereby assigned":—*Held* (affirming the judgment of the Queen's Bench Division), that the bill of sale was void on the ground that it departed from the precise legal effect of the form given in the schedule to the Bills of Sale (1878) Amendment Act, 1882.—*Ex parte Stanford, In re Barber* (17 Q. B. D. 259) discussed.—*Roberts* v. *Roberts* (13 Q. B. D. 794) questioned. Kelly & Co. *v.* Kellond - - - - C. A. 569

7. —— *Registration—Validity—Misdescription of Occupation of Grantor—Incorrect Name—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.] The grantor of a bill of sale was described in the bill of sale and in the affidavit filed upon registration as "Kendrick Turner, tutor," whereas, in fact, his name was Frederick Henry Turner, and he was a schoolmaster:—*Held*, that the misdescription rendered the registration of the bill of sale void. Lee *v.* Turner - 773

8. —— *Registration—Validity—Misdescription of Grantor's Name—Intent to mislead—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.] In a bill of sale given by husband and wife, and in the affidavit filed on registration, the grantors' names were described as "Alfred Salmon and Edith Campbell Salmon, wife of Alfred Salmon." The husband's true name was George Henry Arthur Salmon, and the misdescriptions were purposely made by both the grantors in order to conceal the fact that they had given a bill of sale:—*Held*, that the registration of the bill of sale was not thereby rendered invalid. Downs *v.* Salmon - - - - 775

9. —— *Promissory Note, Validity of, where given as Security for Sums secured by void Bill of Sale—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.] The defendant gave the plaintiffs a bill of sale of personal chattels to secure the repayment of a sum of money and interest; and at the same time, and as part of the same transaction, gave them his promissory note for the payment of the same sum and interest by instalments of the same amounts, and to be paid on the same days, as provided by the bill of sale. The promissory note also stipulated that in the event of any of the instalments falling into arrear the whole amount outstanding should immediately become due and payable. In an action on the promissory note;—*Held* that, though the stipulation in the promissory note rendered the bill of sale void, the promissory note was good, and the plaintiffs were entitled to recover. Monetary Advance Company *v.* Cater - - 785

BISHOP—Refusal to institute clergyman—Discretion—"Due examination and inquiry" - - - - 460
See Ecclesiastical Law. 2.

BOROUGH— Vote—Disqualification—Occupier of almshouse - - - - 302
See PARLIAMENT. 2.

—— Vote—Freeholder—Residence - 300
See PARLIAMENT.

—— Vote—Notice of objection—Description of objector - - - - 297
See PARLIAMENT. 5.

—— Vote—Residence of freeman—Notice of objection—Power of amendment - 287
See PARLIAMENT. 3.

—— Vote—Service franchise—Municipal vote
See PARLIAMENT. 4. [285

—— Vote—Service of notice of objection—"Ordinary course of post" - - 290
See PARLIAMENT. 6.

BOROUGH RATE—Deficiency in assessment to poor-rate—Lands Clauses Acts - 788
See POOR-RATE.

BREACH OF PROMISE — Marriage — Action against personal representatives of promisor — Survival of cause of action—Special damage - - - 494
See MARRIAGE.

BRIDGE — Highway carried over railway by means of bridge—Repairs of roadway of bridge—Obligation of company - 485
See RAILWAY.

CANAL COMPANY — *Right to Support—Mines under or near Canal — Compensation for not working Mines—Right of Action for Injury to Canal.*] By an Act giving a company power to make a canal it was provided that nothing therein contained should affect the right of the owners of land to the mines and minerals lying within or under the lands to be made use of for the canal, and it should be lawful for such owners to work such mines not thereby injuring, prejudicing or obstructing the canal; and further, that if the owner or worker of any coal or mine should in pursuing such mine work near or under the canal, so as in the opinion of the company to endanger or damage the same, or in the opinion of the owner or worker of the mine to endanger or damage the further working thereof, then it should be lawful for the company to treat and agree with the owner or worker, and in case of disagreement a jury was to be summoned to assess the amount such owner or worker ought to receive on being restrained from working such mine, and on payment of the amount assessed by the jury such owner or worker was to be perpetually restrained from working such mine within the limits for which satisfaction should by the jury be declared to extend. The defendants gave the company notice that they were going to work coal forming the support of the canal, and the company declined to purchase or pay compensation to the defendants for leaving the coal. The defendants thereupon worked the coal and thereby damaged the canal: —*Held* (affirming the decision of the Queen's Bench Division), that the coal-owner or worker had a right under the Act to require that compensation should be assessed by a jury, but had no right to work the coal to the injury of the canal, and was liable to the company for the

CANAL COMPANY—*continued.*
damage so caused.—*Dudley Canal Co.* v. *Grazebrook* (1 B. & Ad. 59) distinguished. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* KNOWLES [C. A. 391

CASES—*Agnew* v. *Usher* (14 Q. B. D. 78) distinguished - - - - 147
See PRACTICE.

—— *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (Law Rep. 10 Ex. 35) discussed and distinguished - - - 79
See DAMAGES, MEASURE OF.

—— *Bianchi* v. *Offord* (17 Q. B. D. 484) followed - - - - 304
See BILL OF SALE. 3.

—— *Campbell* v. *Spottiswoode* (3 B. & S. 769) approved and followed - - 275
See DEFAMATION. 2.

—— *Collins* v. *Locke* (4 App. Cas. 674) distinguished - - - - 172
See ARBITRATION.

—— *Davies* v. *Rees* (17 Q. B. D. 408) explained and distinguished - - - 310
See BILL OF SALE. 2.

—— *Dudley Canal Co.* v. *Grazebrook* (1 B. & Ad. 59) distinguished - - - 391
See CANAL COMPANY.

—— *Faulkner, In re* (36 Ch. D. 566), overruled
See SOLICITOR. 5. [204

—— *Goldstrom* v. *Tallerman* (18 Q. B. D. 1) distinguished - - - - 304
See BILL OF SALE. 3.

—— *Hadley* v. *Baxendale* (9 Ex. 341) - 79
See DAMAGES, MEASURE OF.

—— *Henwood* v. *Harrison* (Law Rep. 7 C. P. 606) dissented from - - 275
See DEFAMATION. 2.

—— *Hillman, Ex parte. In re Pumfrey* (10 Ch. D. 622) discussed and explained 732
See BANKRUPTCY. 14.

—— *Hyde* v. *Warden* (3 Ex. D. 72) explained
See VENDOR AND PURCHASER. [523

—— *Johnson* v. *Jones* (9 A. & E. 809) approved and followed - - - 209
See LANDLORD AND TENANT. 3.

—— *Kendall* v. *Hamilton* (4 App. Cas. 504) followed - - - - 155
See PRACTICE. 3.

—— *Moore, Ex parte* (14 Q. B. D. 627), distinguished - - - - 509
See BANKRUPTCY. 4.

—— *Purvis, Re* (56 L. T. (T.S.) 579), explained
See BANKRUPTCY. 15. [518

—— *Reg.* v. *Kettle* (17 Q. B. D. 761) discussed
See COUNTY COURT. 2. [423

—— *Roberts* v. *Roberts* (13 Q. B. D. 794) questioned - - - - 569
See BILL OF SALE. 6.

—— *Shepherd* v. *Conquest* (17 C. B. 427) followed - - - - 378
See COPYRIGHT.

—— *Sheppard* v. *Bradford* (16 C. B. (N.S.) 369) overruled - - - - 450
See POOR-RATE. 2.

CASES—*continued.*

—— *Stanford, Ex parte, In re Barber* (17 Q. B. D. 259) distinguished - 304
See Bill of Sale. 3.

—— ——— dis-
cussed - - - - 569
See Bill of Sale. 6.

—— *Stray* v. *Russell* (1 E. & E. 888, 917) followed - - - - 576
See Company.

—— *Turquand, Ex parte* (14 Q. B. D. 405), discussed - - - - 343
See Bankruptcy. 11.

—— *Wilton, Ex parte* (1 Dowl. (N.S.) 805), discussed - - - - 68
See Practice. 6.

—— *Woodley* v. *Metropolitan District Ry. Co.* (2 Ex. D. 384) distinguished - 359
See Negligence.

CERTIFICATE—Share certificate—Blank transfer power—Negotiable instrument 232
See Negotiable Instrument.

CERTIORARI—Mayor's Court—Practice—Time for lodging writ - - - 643
See Mayor's Court.

—— Practice—Time for lodging writ with officer of Mayor's Court - - - 554
See Mayor's Court. 3.

CHAMBERS—Judge at—Contempt of Court 68
See Practice. 6.

CHILD—Liability to maintain parent—Second marriage - - - - 252
See Poor Law.

CHURCH—Convocation—Election of proctor—Mandamus - - - 740
See Ecclesiastical Law. 4.

—— Disobedience of order of suspension—Ecclesiastical law—Effect of expiration of sentence on order of suspension—Power to issue significavit for contempt—Writ de contumace capiendo - 1
See Ecclesiastical Law. 3.

—— Refusal to institute clergyman—Discretion—Clergyman ignorant of Welsh language—Due examination and inquiry 460
See Ecclesiastical Law. 2.

—— Right of inhabitant to attend divine service in church - - - - 671
See Ecclesiastical Law.

CHURCHWARDEN—Ecclesiastical law—Right of inhabitant to attend divine service in church—Right of churchwarden to prevent an inhabitant from attending service - - - - 671
See Ecclesiastical Law.

COAL MINE—Wages—Payment by weight of mineral - - - - 606
See Mine.

COMMON—Inclosure—Highway—Power to stop up - - - - - 797
See Inclosure.

COMPANY—*Sale of Shares—Custom of Stock Exchange—Refusal of Company to register Transfer—Action to recover Price.*] A contract for the sale of shares in a registered company was made through brokers upon and subject to the rules of the Stock Exchange. In accordance with the practice of the Stock Exchange, the transferee of the shares paid the price of them to the vendor upon delivery to him of a duly executed transfer. An application for registration of the transfer being subsequently made to the directors of the company, who were empowered by the articles of association in their discretion to decline to register a person claiming by transfer of shares, they refused to register the transferee as a member of the company.—The transferee thereupon brought an action to recover back the price of the shares from the vendor as money had and received to his use:—*Held*, following *Stray* v. *Russell* (1 E. & E. 888, 917), that the contract for the sale of shares on the Stock Exchange did not import an undertaking by the vendor that the company would register the transferee, and that the action was not maintainable. London Founders Association, Limited, and Palmer *v.* Clarke - C. A. 576

2. —— *Voluntary Winding-up—Prohibition against carrying on Business—Exception where required for beneficial Winding-up—Onus of Proof—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 131.] By s. 131 of the Companies Act, 1862, a company which is being wound up voluntarily shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof.—The plaintiff company sued the defendants for breach of contract. The contract was of a kind which it was the business of the company to make, but it was entered into after the company had commenced proceedings for a voluntary winding-up. The contract and the breach of it were proved:—*Held*, that it lay on the defendants to shew that the contract was not required for the beneficial winding-up of the company, and that in the absence of such evidence the plaintiffs were entitled to succeed. Hire Purchase Furnishing Company *v.* Richens [C. A. 387

3. —— *Unregistered Company—Action against Official Liquidator—Right to stay of Action—Effect of Vesting Order—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 92, 203.] After an order had been made for winding up an unregistered company under the Companies Act, 1862, the plaintiffs, without leave of the Court in the winding-up, sued the defendants to recover rent charged on property which had vested in the defendants as official liquidators pursuant to s. 203 of the Act:—*Held*, by Huddleston, B., and Manisty, J. (Manisty, J., doubting), that the action must be stayed as having been commenced against a company in liquidation without the leave of the Court contrary to s. 87 of the Act. Graham *v.* Edge - - - - 538

4. —— *Unregistered Company—Winding-up—Official Liquidators, Action against, in Personal Capacity—Stay of Action—Practice—Land subject to Rent-charge—Vesting Order, Effect of—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 92, 203.] An order having been made for the winding-up of an unregistered company under the Companies Act, 1862, the Court directed under s. 203 of the Act that certain land, which was vested in trustees for the company, subject to a

COMPANY—*continued.*

rent-charge, should vest in the official liquidators, appointed for the purposes of the winding-up, by their official name.—The plaintiffs, the owners of the rent-charge upon such land, sued the liquidators in their personal capacity to recover arrears of the rent-charge from them as terre-tenants:—*Held*, that such action ought to be stayed as being manifestly groundless. GRAHAM *v.* EDGE C. A. 683

—— Share certificate—Negotiable instrument—American railway company - C. A. 232
See NEGOTIABLE INSTRUMENT.

COMPENSATION — *Railway — Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 6, 16—*Lands injuriously affected — Termination of Interest of Claimant—Prospective Damage.*] A railway company commenced to build warehouses which were intended to be 100 feet in height. The lessee of a warehouse the light of which would be affected when the buildings were completed gave notice to the railway company that he held on a lease for an unexpired term of fourteen years, which could be determined by six months' notice, to expire on November 11 then next, and required the company to determine whether they would take over the lease, or whether he should give the requisite notice. The company declined to interfere, and the lessee on May 6 gave notice to determine his tenancy. There was no evidence that at that time the building had progressed so far as to affect the light to the warehouse. Afterwards the lessee gave notice to the company of his claim for compensation for injuriously affecting his lands, and an inquiry was held before the sheriff and a jury:—*Held*, reversing the judgment of the Queen's Bench Division, that the act of the lessee in giving notice to terminate his lease, not being the natural result of the acts of the railway company, but a free exercise of will on his part, he could not recover compensation on the footing that he was entitled to a fourteen years' lease:—*Held*, also, that the claimant could not recover compensation in respect of an injury which was merely prospective and which did not exist at the time of making the claim. THE QUEEN *v.* POULTER - - - - 132

COMPROMISE—Authority of counsel to compromise—Conduct of action - 141
See COUNSEL.

CONNIVANCE—Adultery by wife—Liability of husband for necessaries supplied to wife - - - - 354
See HUSBAND AND WIFE. 4.

CONTEMPT OF COURT—Judge at chambers 68
See PRACTICE. 6.

CONTRACT—Action against joint contractors—Adding parties - - - 155
See PRACTICE. 3.

CONVEYANCE—CONSTRUCTION OF—*Parcels—Grant of Riparian Land—Bed of River ad medium filum, Presumption that included rebuttable—Surrounding Circumstances dehors the Deed—Fishery treated as Separate Tenement—Franchise—Prerogative of Crown—Non-tidal River.*] The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river usque ad medium filum should pass, may be rebutted by

CONVEYANCE—CONSTRUCTION OF—*continued.*

proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention.—The owners of a manor by conveyances made respectively in 1767 and 1846 granted to purchasers pieces of riparian land fronting a river, the bed of which formed parcel of the manor. It was proved that, prior to the earliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; and that at the date of the conveyances in 1846 such fishery was actually under lease to tenants. The grantees under the before-mentioned conveyances, and their successors in title, had, until the acts complained of in the action, never claimed or exercised any right of fishing over the bed of the river by virtue of any right of soil or otherwise, but the owners of the manor or their tenants of the fishery had always fished without interruption:—*Held*, that under the circumstances the conveyances ought not to be construed as passing any portion of the bed of the river to the grantees.—*Quære*, whether the Crown ever could have as part of its prerogative an exclusive right of fishing in a non-tidal river flowing over the soil of a subject; and whether, if the Crown could have such right, it could be granted to a subject as a franchise. DUKE OF DEVONSHIRE *v.* PATTINSON - - - - C. A. 263

CONVOCATION — Election of proctor — Mandamus - - - - 740
See ECCLESIASTICAL LAW. 4.

COPYRIGHT — *Musical Composition — Right of Representation—Absence of Consent in writing by Author—"Contrary to right of author"*—3 & 4 *Wm.* 4, *c.* 15, *ss.* 1, 2—5 & 6 *Vict. c.* 45, *ss.* 20, 21.] By 3 & 4 Wm. 4, c. 15, ss. 1 and 2, it is in substance provided that the author of any dramatic piece or entertainment, or the assignee of such author, shall have, as his own property, the sole liberty of representing such production, or causing it to be represented, at any place of dramatic entertainment during certain periods mentioned in the Act, and shall be deemed the sole proprietor thereof, and that, if any person shall, during the continuance of such sole liberty as aforesaid, "contrary to the intent of this Act, or right of the author or his assignee," represent such production, or cause it to be represented, without the consent in writing of the author or other proprietor, at any place of dramatic entertainment, every such offender shall be liable for each and every such representation (among other alternatives) to the payment of an amount not less than 40*s.* to the author or other proprietor. By 5 & 6 Vict. c. 45, ss. 20 and 21, the above provisions are extended to musical compositions, and it is provided that the sole liberty of representing dramatic pieces and musical compositions shall endure and be the property of the author and his assigns for the term in the Act provided for the duration of copyright in books.—The plaintiff was employed by the defendant, the proprietor of a music-hall, as the conductor of the orchestra, at a weekly salary, and had been in the habit of composing the music for ballets performed there,

COPYRIGHT—*continued.*

receiving payments of varying amounts from the defendant in respect of such compositions. The plaintiff composed the music for a Christmas ballet, to be performed at the defendant's music-hall, but while the piece was running he threw up his engagement as conductor, and took away the musical score and band-parts necessary for the performance of the music. It was subsequently arranged orally between the plaintiff and the defendant that the plaintiff should give up the score and band-parts to the defendant in consideration of a payment of 20*l.* by the defendant. The defendant afterwards continued to perform the piece with the plaintiff's music, and the plaintiff brought an action to recover penalties in respect of such subsequent performances. The jury found that the music composed for the ballet by the plaintiff was a substantial, independent, musical composition, and that the plaintiff had not sold his rights therein to the defendant:—*Held*, that, in the absence of any assignment or consent to the representation of the composition in writing given by the plaintiff, the performances were contrary to the right of the author, and the action was maintainable.—*Shepherd* v. *Conquest* (17 C. B. 427) followed. Eaton *v.* Lake [C. A. 378

CORN—Expenses of cutting, carrying, threshing, and dressing—Costs of execution—Sheriff - - - - - 40
See Bankruptcy. 10.

CORONER — *Inquisition — Amendment — Persons charged with Murder or Manslaughter—Insufficient Designation—Jurisdiction of Queen's Bench Division to quash Inquisition—Coroners Act*, 1887 (50 & 51 *Vict. c.* 71), *s.* 20.] By s. 20 of the Coroners Act, 1887, if in the opinion of the Court having cognisance of the case an inquisition finds sufficiently the matters required to be found thereby, and where it charges a person with murder or manslaughter sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the Court may order the proper officer of the Court to amend any defect.—On a rule for a certiorari to bring up and quash an inquisition charging that "the directors of the Great Western Railway Company" did feloniously kill and slay G.:—*Held*, that the Queen's Bench Division had no power to amend the inquisition by sufficiently designating the directors by name, because the power to amend was limited by s. 20 to the Court before whom the persons charged should be brought for trial; but that the jurisdiction of the Queen's Bench Division to quash the inquisition for the irregularity on the face of it was left untouched by that section. The Queen *v.* The Directors of Great Western Railway Company - - - - - - 410

COSTS—Abortive execution—Judgment debt—Bankruptcy—Petitioning creditor's debt
See Bankruptcy. 7. [316

—— Lands Clauses Acts—Costs incidental to arbitration — Special case — Court of Appeal—Jurisdiction over costs - 699
See Waterworks.

COSTS—*continued.*

—— Mercantile reference—Implied contract to pay arbitrator and umpire reasonable remuneration - - - 48
See Arbitration. 2.

—— Sale of goods—Action by sub-vendee against purchaser—Damages - - 79
See Damages, Measure of.

—— Security for—Appeal—Abuse of the process of the Court - - - 331
See Practice. 5.

—— Security for—Bankruptcy—Proof by creditor resident abroad - - 146
See Bankruptcy. 12.

—— Sheriff — Execution — Bankruptcy — Expenses incurred for benefit of property seized - - - - 40
See Bankruptcy. 10.

—— Solicitor — Charging order — Lien — "Property recovered or preserved" - 693
See Solicitor. 4.

—— Solicitor—Order for delivery of bill—Business not transacted in court—Jurisdiction - - - - - 656
See Solicitor. 3.

—— Taxation — Remuneration for conducting sale by auction when auctioneer paid by client - - - - 204
See Solicitor. 5.

—— Taxation—Trial with a jury—Claim and counter-claim—Event—Entry of judgment—Taxation where plaintiff succeeds on claim and defendant on counter-claim - - - - 334
See Practice. 10.

—— Trustee — Settlement — Voluntary conveyance—Lien on trust fund - - 43
See Bankruptcy. 13.

COUNSEL—*Conduct of Action—Authority to compromise.*] On the trial of an action for malicious prosecution the defendant's counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for 350*l.* with costs upon the understanding that all imputations against the plaintiff were withdrawn:—*Held*, that this settlement was a matter which was within the apparent general authority of counsel and was binding on the defendant. Matthews *v.* Munster - - C. A. 141

COUNTY—Defaulting highway authority—Indictment for non-repair—Urban sanitary authority - - - - 810
See Local Government Acts. 4.

—— Justices—Jurisdiction—Offence committed in one petty sessional division of a county — Committal in different division of same county - - 187
See Justices. 2.

—— Maintenance of road—Liability of county authority - - - - 794
See Highway.

—— Vote—Notice of objection—Description of place of abode of objector - 294
See Parliament. 7.

COUNTY COURT — *Appeal—Interpleader—"Action" — Amount not exceeding* 20*l.* — *Leave to*

COUNTY COURT—*continued.*

Appeal—19 & 20 *Vict. c.* 108, *s.* 68—30 & 31 *Vict. c.* 142, *s.* 13.] An appeal does not lie, even by leave of the judge, from the decision of a county court in proceedings in interpleader, where neither the money claimed, nor the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.* COLLIS *v.* LEWIS - - 202

2. —— *Practice — Appeal — "Application to County Court"—Friendly Societies Act,* 1875 (38 & 39 *Vict. c.* 60), *s.* 22, *sub-s.* (*d*).] By s. 22 of the Friendly Societies Act, 1875, disputes between members of a friendly society, and the society or its officers are to be decided in manner directed by the rules of the society, and by sub-s. (*d*) "where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the county court, or to a court of summary jurisdiction, which may hear and determine the matter in dispute:—*Held*, that the application to the county court contemplated by sub-s. (*d*) must be taken to be an application in the form of an action commenced in the county court, and not a reference to the county court judge sitting as an arbitrator, and that there was an appeal from the decision upon such application to the High Court:—*Quære*, where a statute had given an appeal by special case to the High Court from an inferior court under special circumstances, whether such right was affected by Order LIX., r. 10?—*Reg.* v. *Kettle* (17 Q. B. D. 761) discussed. WILKINSON *v.* JAGGER - - C. A. 423

3. —— *Appeal—Interlocutory Order—Equitable Jurisdiction — County Courts Act,* 1865 (28 & 29 *Vict. c.* 99).] An appeal lies from an order made in an interlocutory proceeding, by a judge of a county court, by virtue of the equitable jurisdiction conferred by the County Courts Act, 1865. JONAS *v.* LONG - - C. A. 564

4. —— *Execution—High Bailiff's Fees—Possession Money—County Courts Act,* 1856 (19 & 20 *Vict. c.* 108), *ss.* 78, 79, 83, *Schedule* (*C*)—*County Court Rules,* 1886, *Order XXVII, r.* 1.] Where a claim is made to goods taken in execution by the high bailiff of a county court, and the execution creditor sends notice, under Order XXVII., r. 1, of the County Court Rules, 1886, of his admission of the claim to the high bailiff, who withdraws from possession, the judge of the county court has power to award possession money up to the time of the receipt of such notice to the high bailiff, and the high bailiff can recover such possession money from the execution creditor by action in the county court, if the judge in the exercise of his discretion is of opinion that the circumstances of the case are such that possession money ought to be awarded. THOMAS *v.* PEEK [727

5. —— *Jurisdiction — Landlord and Tenant —Ejectment—Determination of Tenancy—"Legal Notice to Quit"—County Courts Act,* 1856 (19 & 20 *Vict. c.* 108), *s.* 50.] By s. 50 of the County Courts Act, 1856, jurisdiction in ejectment is given to the county courts in cases where neither the rent nor the value of the premises exceeds

COUNTY COURT—*continued.*

50*l.* a year, and the tenant's term and interest "shall have expired, or shall have been determined either by the landlord or the tenant by a legal notice to quit."—The plaintiff let to the defendant a house for three years at a rent of 3*l.* 6*s.* 8*d.* a month, payable monthly; the agreement of tenancy contained a power of re-entry on non-payment of any part of the rent for twenty-one days after the day of payment, or in case of the breach or non-performance of any of the conditions in the agreement. A month's rent having been in arrear for more than twenty-one days, the plaintiff gave the defendant notice to quit at the end of the next month of the term, alleging as breaches non-payment of rent and a breach of a condition in the agreement:—*Held*, that a "legal notice to quit" must be taken to mean the notice to quit required by law and not one depending on the express stipulation of the parties; that the tenancy had not, therefore, been determined within the meaning of the section, and that an action to recover possession of the premises could not be brought in the county court.—*Semble*, that the jurisdiction of the county court under s. 50 of the County Courts Act, 1856, is confined to tenancies from year to year. FRIEND *v.* SHAW - - - - 374

6. —— *Jurisdiction—Warrant of Execution —Goods in Foreign District—Negligence of High Bailiff of Foreign Court—Jurisdiction over High Bailiff of Judge of Court out of which Warrant originally issued—Prohibition—County Courts Act,* 1846 (9 & 10 *Vict. c.* 95), *ss.* 104, 115.] The jurisdiction given by s. 115 of the County Courts Act, 1846, to a county court judge, enabling him to order a bailiff to compensate a plaintiff who has suffered damage by his neglect, connivance, or omission in levying an execution can only be exercised by him against the bailiffs of his own court.—Execution was issued in a county court, and the warrant was sent for execution to a foreign county court, and the high bailiff of such court was guilty of negligence in levying under it:—*Held*, that the judge of the home court had no power under s. 115 to order the high bailiff of the foreign court to pay damages to the plaintiff, who had been injured by his negligence, and that the high bailiff was entitled to a prohibition. THE QUEEN *v.* JUDGE OF THE COUNTY COURT OF SHROPSHIRE - - - - - 242

7. —— *Practice — Action in High Court — Claim exceeding* 50*l.* — *Reduction by admitted Set-off—Order for Trial in County Court—County Courts Act,* 1856 (19 & 20 *Vict. c.* 108), *s.* 26.] Where in answer to a claim exceeding 50*l.* the defendant claims by way of set-off and counter-claim an amount which, if deducted from the amount of the plaintiff's claim, would leave a balance not exceeding 50*l.*, and the reply admits the defendant's claim, an order can be made, on the application of the plaintiff, under s. 26 of the County Courts Act, 1856, that the cause be tried in a county court. LEWIS *v.* LEWIS - 56

8. —— *Practice—Remitted Action—Parties—Power of County Court Judge to add Defendant—County Courts Act,* 1867 (30 & 31 *Vict. c.* 142), *s.* 10.] Where an action has been remitted for trial in the county court under s. 10 of the County

COUNTY COURT—*continued.*

Courts Act, 1867, the county court judge has no power to add a defendant without his consent. Mulleneisen *v.* Coulson - - - 667

—— Bankruptcy—Deceased debtor — Administration of estate—Order affecting rights of stranger—Jurisdiction - - 38
See Bankruptcy. 2.

—— Judgment summons—Order of committal—Married woman - - - 120
See Husband and Wife. 3.

—— Prohibition—Receiver—Fund in discretion of trustees—Order against trustees for payment—Excess of jurisdiction - 167
See Receiver.

COUNTY RATE — Deficiency in assessment to poor-rate—Lands Clauses Act - 788
See Poor-rate.

CRIMINAL LAW—48 & 49 *Vict. c.* 69, *s.* 20—*Indictment for Indecent Assault and Common Assault—Evidence of Prisoner — Conviction for Common Assault only.*] The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 20, renders a person charged with an indecent assault a competent witness on the hearing of such charge, but does not apply to a charge of common assault. The prisoner was tried on an indictment containing two counts, one for an indecent assault, and another for a common assault, and, on the hearing, gave evidence on oath in his defence. He was acquitted of the charge of indecent assault, but convicted of the common assault:—*Held*, that his evidence being legally admissible, the conviction was right. The Queen *v.* Owen - - 829

2. —— 48 & 49 *Vict. c.* 69, *s.* 4—*Indictment for carnally knowing Girl under Thirteen—Unsworn Evidence of—Conviction under s.* 9 *for Indecent Assault.*] The prisoner was indicted under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c, 69). s. 4, for unlawfully and carnally knowing a girl under the age of thirteen years. The child, not understanding the nature of an oath, gave her evidence under the above section without being sworn. The jury acquitted the prisoner of the charge under s. 4, but, by virtue of the power given to them in s. 9, found him guilty of an indecent assault. Apart from the girl's testimony the evidence was insufficient to support the conviction. The Act contains no provision rendering unsworn evidence admissible on an indictment for indecent assault:—*Held*, that the conviction was right. The Queen *v.* Wealand - - - C. C. R. 827

3. —— *Larceny — Money deposited to abide Event of a Wager—Property remaining in Depositor—Possession obtained by Fraud—Larceny by a Trick.*] The prisoner was at a race-meeting offering to lay odds against different horses. He made a bet with the prosecutor laying odds against a particular horse, and the money for which the prosecutor backed the horse was deposited with the prisoner. The prosecutor admitted that he would have been satisfied if he did not receive back the same coins. The horse won, but the prisoner went away with the money, and afterwards when the prosecutor met him, he denied that he had made the bet.—The prisoner was convicted of larceny, and a case was reserved, the

CRIMINAL LAW—*continued.*

question being whether there was any evidence to be left to the jury:—*Held*, that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to repay it in any event, there was no contract by which the property in the money could pass, and therefore there was evidence of larceny by a trick. The Queen *v.* Buckmaster - - - C. C. R. 182

CROWN — Prerogative — Fishery — Non-tidal river - - - 263
See Conveyance, Construction of.

DAMAGES, MEASURE OF — *Sale of Goods — Breach of Warranty—Sub-sale with similar Warranty—Costs of Action by Sub-vendee against the Purchaser reasonably defended.*] The defendant contracted for the sale of coal of a particular description to the plaintiffs, knowing that they were buying such coal for the purpose of reselling it as coal of the same description. The plaintiffs did so resell the coal. The coal delivered by the defendant to the plaintiffs under the contract and by them delivered to their sub-vendees did not answer such description, but this could not be ascertained by inspection of the coal, and only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against the plaintiffs. The plaintiffs gave notice of the action to the defendant, who, however, repudiated all liability, insisting that the coal was according to contract. The plaintiffs defended the action against them, but at the trial the verdict was that the coal was not according to contract, and the sub-vendees accordingly recovered damages from the plaintiffs. The plaintiffs thereupon sued the defendant for breach of contract, claiming as damages the amount of the damages recovered from them in the action by their sub-vendees, and the costs which had been incurred in such action. The defendant paid the amount of the damages in the previous action into court, but denied his liability in respect of the costs:—*Held*, that, the defence of the previous action being, under the circumstances, reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable, under the rule in *Hadley* v. *Baxendale* (9 Ex. 341), as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it.—*Baxendale* v. *London, Chatham, and Dover Ry. Co.* (Law Rep. 10 Ex. 35) discussed and distinguished. Hammond & Co. *v.* Bussey [C. A. 79

DAMAGES—Master and servant—Action for defacing written character - - 635
See Defamation.

DEFAMATION — *Libel — Publication — Husband and Wife—Communication of Libel by Husband to Wife—Defacement of Testimonial of Character —Damages.*] In an action for libel the fact that the defendant has disclosed the libel to his wife is not evidence of publication.—In an action for

DEFAMATION—*continued.*

maliciously defacing the written character of a servant by writing upon it a disparaging statement, the plaintiff may recover substantial damages. WENNHAK *v.* MORGAN - - 635

2. —— *Libel—Newspaper Criticism of Stage Play—Question to be left to Jury—"Fair Criticism"—Privilege.*] Where an action of libel is brought in respect of a comment on a matter of public interest the case is not one of privilege, properly so called, and it is not necessary in order to give a cause of action that actual malice on the part of the defendant should be proved. The question whether the comment is or is not actionable depends upon whether in the opinion of the jury it goes beyond the limits of fair criticism.—*Campbell* v. *Spottiswood* (3 B. & S. 769) approved and followed.—*Henwood* v. *Harrison* (L. R. 7 C. P. 606) dissented from. MERIVALE *v.* CARSON - - - - - C. A. 275

DEFENCE—Time for delivery—Specially indorsed writ—Irregular judgment, setting aside - - - - - 764
See PRACTICE. 8.

DESERTION—Married woman—Order for support by husband - - - 76
See HUSBAND AND WIFE.

DISCLAIMER—Bankrupt lessee—Mortgage by sub-demise - - - - 343
See BANKRUPTCY. 11.

DISQUALIFICATION—Bankruptcy—Certificate that bankruptcy was caused by "misfortune without any misconduct" on the part of bankrupt - - - 816
See BANKRUPTCY. 16.

—— Borough vote—Other alms which by the law of Parliament disqualify - 302
See PARLIAMENT. 2.

—— Justices—Interest—Advice given by justices - - - - - 58
See JUSTICES.

DISTRESS—Privilege—Agricultural Holdings Act, 1883—"Live stock taken in by tenant of holding to be fed at a fair price" - - - - 807
See LANDLORD AND TENANT.

DIVORCE—Bankruptcy notice—Final judgment—Order for payment of alimony pendente lite - - - - 509
See BANKRUPTCY. 4.

EASEMENT—*Right of Way—Grant of Way by General Words—"Appurtenances."*] The plaintiff and defendant were tenants under the same landlord of adjoining farms near the sea-coast, to which a highway ran through the defendant's farm; the plaintiff's farm communicated with the highway by a private road, which joined the highway at A. From a point on the plaintiff's farm and on the private road, an ancient lane ran to a spot on the highway nearer than A. to the sea-coast; this lane was not only the nearest way from the plaintiff's farm to the sea-coast, but was also level, whereas the private road was steep and hilly. The lane, which was a formed roadway bounded on either side by turf banks and hedges,

EASEMENT—*continued.*

ran wholly through the defendant's land, except for a few yards where it started from the private road on the plaintiff's farm, but it had no communication on either side with the defendant's land, and was only open to the defendant's access at the point where it joined the highway; it had been used for many years by the plaintiff, and had been from time to time repaired by him. Prior to 1873 the plaintiff and defendant were tenants from year to year of their respective farms; in that year the landlord granted to the defendant a lease of his farm, which contained no reference to the lane or to its user by the plaintiff; but the soil of the lane was admittedly included in the admeasurements of the defendant's farm. In 1878 the landlord granted to the plaintiff a lease of his farm "and all houses, buildings, and appurtenances thereto belonging," in which no specific mention was made of the lane or of any right of way over it. The defendant having interfered with the plaintiff's user of the lane:—*Held* (affirming the decision of the Queen's Bench Division), that the lease to the defendant did not amount to a demise of the soil of the lane free from the plaintiff's right of way, inasmuch as the lessor, not being in possession at the date of the lease, could not make such a demise without derogating from the grant to the plaintiff under which his then existing tenancy was constituted; that there was an implied reservation of the right of way out of the defendant's lease; and that the right of way over the lane passed to the plaintiff by the lease of 1878 under the word "appurtenances." THOMAS *v.* OWEN - - - C. A. 225

ECCLESIASTICAL LAW—*Churchwarden—Right of Inhabitant to attend Divine Service in Church—Right of Churchwarden to prevent an Inhabitant from attending Service—Jurisdiction of Temporal Courts.*] There is no right on the part of a churchwarden forcibly to prevent an inhabitant of a parish or district from entering the church for the purpose of attending service, even though the churchwarden may be of opinion that he cannot be conveniently accommodated.—The statute 5 & 6 Edw. 6, c. 1, s. 2, having imposed a general duty to go to church, which still is binding upon members of the Church of England, has conferred a correlative general right to go to church on those who are so obliged to go.—The temporal Courts have jurisdiction over an action against a churchwarden for forcibly preventing an inhabitant from entering the church for the purpose of attending divine service. TAYLOR *v.* TIMSON [671

2. —— *Bishop—Welsh Diocese—Clergyman ignorant of Welsh Language—Refusal to institute—Discretion—"If he shall think fit"—"Due Examination and Inquiry"*—1 & 2 *Vict. c.* 106, *s.* 104.] By 1 & 2 Vict. c. 106, s. 104, within certain dioceses "it shall and may be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who, after due examination and inquiry, shall be found unable to preach, administer the sacraments, perform other pastoral duties, and converse in the Welsh language."—The patron of a benefice in one of such dioceses presented a clergyman who

ECCLESIASTICAL LAW—*continued.*

could not speak Welsh. The bishop thereupon commissioned certain persons to hold an inquiry as to whether the parish required a pastor who should know Welsh. The persons so commissioned held the inquiry and reported to the bishop, but refused to permit the patron or the clergyman to be present or to be represented or produce evidence at the inquiry. The bishop, on receiving the report, refused to admit or institute the clergyman.—In an action by the patron against the bishop in respect of such refusal:—*Held*, that "due examination and inquiry" meant examination and inquiry as to the clergyman's knowledge of the Welsh language, not as to the requirements of the parish, that the statute gave an absolute discretion to the bishop as to the mode of ascertaining the requirements of the parish, that he was not bound to hold a formal inquiry of a judicial character for that purpose, and therefore the refusal to hear the patron or the clergyman did not invalidate the inquiry which was held, and the bishop was justified in refusing to admit or institute the clergyman. Marquis of Abergavenny *v.* Bishop of Llandaff 460

3. —— *Disobedience of Order of Suspension—Period of Suspension, issue of writ de contumace capiendo after—53 Geo. 3, c. 127, ss. 1, 2, 3—5 Eliz. c. 23, s. 10—Contumacy—Satisfaction—Old Practice on Excommunication—Habeas Corpus—Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19.] The power to issue a writ de contumace capiendo under 53 Geo. 3, c. 127, for disobedience of an order of the Ecclesiastical Court is not confined to cases where obedience to the order remains possible.—A clerk in orders having disobeyed a monition issued in a suit instituted against him in the Ecclesiastical Court under the Church Discipline Act, 1840, a suspension was published and served upon him whereby he was suspended from his clerical office for a period of six months. During such period he officiated in his church, notwithstanding the suspension, and a significavit in respect of such disobedience issued against him. After the expiration of the six months, a writ de contumace capiendo was issued against him under 53 Geo. 3, c. 127, s. 1, upon which he was arrested:—*Held*, reversing the decision of the Queen's Bench Division, that the writ was lawfully issued.—The 19th section of the Judicature Act, 1873, gives an appeal from orders made by the High Court of Justice on application for habeas corpus whether the order grants or refuses the writ. Ex parte Rev. James Bell Cox - - C. A. 1

4. —— *Mandamus—Convocation—Archbishop as President of Convocation—Election of Proctor.*] The Archbishop of York as president of the Convocation of his province having decided that a candidate who had been elected to represent an archdeaconry in the Lower House was disqualified:—*Held*, that the Court had no jurisdiction to grant a mandamus commanding the Archbishop to admit the candidate to Convocation. The Queen *v.* Archbishop of York - 740

EJECTMENT—County court—Notice to quit—Determination of tenancy - - 374
See County Court. 5.

EVIDENCE—Criminal Law Amendment Act—Unsworn evidence - - - 827
See Criminal Law. 2.

—— Onus of proof—Company—Voluntary winding-up—Business carried on for purposes of winding-up - - - 387
See Company. 2.

—— Prisoner—Criminal Law Amendment Act—Indictment for indecent assault and common assault - - - 829
See Criminal Law.

EXAMINATION — Bankruptcy — Witness summoned for examination respecting property of bankrupt—Refusal to answer questions - - - - 518
See Bankruptcy. 15.

EXECUTION — Costs of abortive execution — Judgment debt—Bankruptcy—Petitioning creditor's debt - - - 316
See Bankruptcy. 7.

—— County court—High bailiff's fees—Possession money - - - - 727
See County Court. 4.

—— Liability of under-sheriff for proceeds of execution—Death of sheriff—Vacancy of shrievalty - - - 107
See Sheriff.

—— Sheriff—Costs—Bankruptcy—Expenses incurred for benefit of property seized 40
See Bankruptcy. 10.

EXECUTOR—Action for breach of promise of marriage—Survival of cause of action
See Marriage. [494

—— Sheriff—Under-sheriff—Vacancy of shrievalty—Liability of under-sheriff for proceeds of execution - - - 107
See Sheriff.

EXTRADITION — Habeas corpus — Appeal to Court of Appeal—"Criminal cause or matter" - - - - 832
See Practice. 4.

FALSE IMPRISONMENT—Pawnbroker—Detention of person offering article to pawn—Reasonable suspicion that article was stolen - - - - 558
See Pawnbroker.

FISHERY—Separate tenement — Grant of riparian land - - - - 263
See Conveyance, Construction of.

FORFEITURE—Lease — Agreement for lease — Notice - - - - 585
See Landlord and Tenant. 2.

FRANCHISE—Crown—Grant to subject—Fishery—Non-tidal river - - - 263
See Conveyance, Construction of.

FRAUDS, STATUTE OF—Agreement not to be performed within a year—Executed consideration - - - - 529
See Husband and Wife. 2.

FREEHOLDER—Borough vote—Residence 300
See Parliament.

FRIENDLY SOCIETY—County court—Practice—Appeal—Application to county court
See COUNTY COURT. 2. [423

—— Trade union—Benefit or friendly society
See TRADE UNION. [412

GARNISHEE ORDER—Judgment debtor—Garnishee—Bankruptcy notice - 690
See BANKRUPTCY. 6.

GRANT—Right of way—General words—"Appurtenances" - - - 225
See EASEMENT.

HABEAS CORPUS—Appeal—Appeal to Court of Appeal—Practice - - - 1
See ECCLESIASTICAL LAW. 3.

—— Appeal to Court of Appeal—Extradition—"Criminal cause or matter" - 832
See PRACTICE. 4.

HIGH BAILIFF—County court—Warrant of execution—Goods in foreign district—Negligence of high bailiff in foreign court—Jurisdiction of judge of home court
See COUNTY COURT. [242

—— Fees—County court—Execution—Possession money - - - - 727
See COUNTY COURT. 4.

HIGHWAY—*Main Road—"Maintenance" of Road—Improvement—Liability of County Authority—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.] Converting a macadamized road into a paved road does not come within the term "maintenance" of the road as used in s. 13 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77): and therefore a highway authority cannot recover half the expenses thereby incurred from the county authority under that section. LEEK IMPROVEMENT COMMISSIONERS *v.* JUSTICES OF STAFFORD - - - - C. A. 794

—— Highway carried over railway by means of bridge—Repairs of roadway of bridge—Obligation of company - - 485
See RAILWAY.

—— Indictment for non-repair—Urban sanitary authority—County authority - 810
See LOCAL GOVERNMENT ACTS. 4.

—— Power to stop up—Old inclosures - 797
See INCLOSURE.

HUSBAND AND WIFE—*Married Woman—"Desertion"—Order for support by Husband—Married Women (Maintenance in case of Desertion) Act*, 1886 (49 & 50 *Vict. c.* 52), *s.* 1.] By the Married Women (Maintenance in case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), s. 1, any married woman who has been "deserted" by her husband may summon him before justices, and the justices "if satisfied that the husband, being able wholly or in part to maintain his wife and family, has wilfully neglected or refused so to do and has deserted his wife," may order that he shall pay her a weekly sum for her support.—Upon a summons by a married woman under the Act it appeared that disputes had arisen between her and her husband and that they had lived apart under an agreement for separation, by which he undertook to pay her a weekly allowance so long as she should live chastely and should not molest him. He had ceased to make and had refused to continue the weekly payments under the agreement. He charged his wife with adultery, but the justices found that the charge was not proved:—*Held*, that the refusal of the husband to pay his wife the weekly allowance and to carry out the agreement of separation was not sufficient evidence of "desertion" within the Act to warrant the justices in making an order against him for her support. PAPE *v.* PAPE - 76

2. —— *Action by Wife for Money due under Agreement for Separation—Power of Wife to contract without Intervention of Trustee—Agreement not to be performed within a Year—Executed Consideration—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.] A husband and wife having taken out cross-summonses against each other for assaults, entered into a verbal agreement with each other to withdraw the summonses and to live apart, the husband allowing the wife a weekly sum for maintenance, and the wife indemnifying the husband against any debts she might contract. An action having been brought in the county court by the wife against her husband for six weeks' arrears of maintenance under the agreement:—*Held*, that the husband and wife had power to contract, without the intervention of a trustee, to live apart, in consideration of their agreeing not to take legal proceedings against one another, and that the action was maintainable:—*Held*, also, that, the consideration being executed, the wife was entitled to recover as for "money paid at the defendant's request" at the rate fixed by the verbal agreement, even assuming that the agreement was one "not to be performed within one year," under s. 4 of the Statute of Frauds. MCGREGOR *v.* MCGREGOR - - - - - 529

3. —— *Married Woman—Judgment Debt—Order of Committal—Jurisdiction—Judgment limited to Separate Property—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (2).] Under s. 5 of the Debtors Act, 1869, there is no power to commit to prison a married woman for her default in paying a sum for which judgment has been recovered against her by virtue of s. 1, sub-s. (2), of the Married Women's Property Act, 1882.—The proper form of judgment against a married woman under s. 1, sub-s. (2), of the Married Women's Property Act, 1882, settled by the Court. SCOTT *v.* MORLEY - C. A. 120

4. —— *Wife living apart from Husband—Necessaries supplied to Wife—Liability of Husband—Adultery of Wife—Connivance by Husband.*] In an action against a husband for necessaries supplied to his wife it appeared that the wife had committed adultery with the connivance of her husband, and the husband subsequently turned her out of doors; that she had no means of support; and that the plaintiff supplied her with the necessaries in question while she was living separate from her husband:—*Held*, affirming the judgment of the Queen's Bench Division, that the husband was liable. WILSON *v.* GLOSSOP [C. A. 354

HUSBAND AND WIFE—*continued.*

—— Libel — Publication — Communication of libel by husband to wife - - 635
See Defamation.

—— Married woman—Separate estate—Liability to bankrupt law - - - 249
See Bankruptcy. 9.

INCLOSURE—*Inclosure Act*, 1845 (8 & 9 *Vict.* c. 118), s. 62—*Highway, Power to stop up—Old Inclosures.*] By the 62nd section of the Inclosure Act, 1845, power is given to the valuer acting in the matter of any inclosure to set out and make public roads and ways, and widen public roads and ways, in or over the land to be inclosed, and to stop up, divert or alter any of the roads or ways passing through the land to be inclosed, or "through any old inclosures in the parish or respective parishes in which the land to be inclosed shall be situate":—*Held*, that the power of stopping up roads so given is not confined to roads passing through old inclosures or intakes from the waste or common, the subject of inclosure, but extends to roads passing through any old inclosures within the parish. Hornby *v.* Silvester - - - - - C. A. 797

INCOME TAX—Income from lands—Deduction for costs of embankment to protect encroachment of tidal river - - 589
See Revenue. 2.

—— Repayment of — Computation of profits — "Shall find and shall prove within or at the end of the year of" assessment - - - - - 549
See Revenue. 4.

—— Revenue—Bodies corporate or incorporate—Income of profits of property—Duty—Exemption - - - - 621
See Revenue.

—— Tithe commutation rent-charge—Annual value - - - - 442
See Revenue. 3.

—— Trade exercised within United Kingdom—Foreigner resident abroad - 753
See Revenue. 5.

INDICTMENT—Evidence of prisoner—Criminal Law Amendment Act—Indictment for indecent assault and common assault
See Criminal Law. [829

—— Evidence not on oath — Criminal Law Amendment Act - - - 827
See Criminal Law. 2.

INN—*Licensing Acts—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict.* c. 27), ss. 8, 19—*Certificate of Justices for Excise Licence for Sale of Beer, Cider, or Wine—Application by Holder of License in force on May* 1, 1869—*Jurisdiction of Justices—Mandamus—Return of Obedience—Pleading.*] By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19—where on May 1, 1869, a licence is in force with respect to a house for the sale therein of beer, cider, or wine to be consumed on the premises, the justices are not to be entitled to refuse an application for a certificate for the sale of beer, cider or wine to be consumed on the premises in respect of such house except upon one

INN—*continued.*

or more of four grounds specified.—Upon an application to licensing justices under the above section for a certificate for a licence to sell wine to be consumed on the premises, it appeared that on May 1, 1869, a licence was in force with respect to the house for the sale of beer to be consumed on the premises:—*Held*, reversing the decision of Charles, J., that, upon the true construction of s. 19, the discretion of the justices in refusing the application was unlimited, for the existence of a licence with regard to the sale of beer did not confer any privilege upon an application for a certificate in respect of the sale of either wine or cider.—Upon a mandamus to justices to hear and determine an application for a certificate to sell wine to be consumed on the premises, they made a return of unconditional compliance with the writ. Plea, that the justices were only entitled to refuse the application upon one or more of the four grounds specified in s. 8 of the Wine and Beerhouse Act, 1869, but that they refused the application on other grounds contrary to the statute:—*Held*, that the plea was good, as it must be taken to mean that in refusing the application the justices had assumed to exercise a jurisdiction which they did not possess, and that they had therefore not substantially heard and determined the matter submitted to them. The Queen *v.* King - - - - - C. A. 430

2. —— *Lodger, Sale of Intoxicating Liquors to —Consumption by Guests of Lodger during Closure of Licensed Premises—Licensing Act*, 1874 (37 & 38 *Vict.* c. 49).] By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 9), "Any person who during the time at which premises for the sale of intoxicating liquors are directed to be closed . . . sells . . . any intoxicating liquor . . . or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises," is liable to a penalty. By s. 10, "nothing in this Act . . . contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to bonâ fide travellers or to persons lodging in his house."—The appellant, a licensed innkeeper, sold and supplied to a bonâ fide lodger in his house intoxicating liquors which were consumed, during the time at which the premises are directed to be closed, in a private room on the premises by the lodger and bonâ fide guests of the lodger after a dinner given by him to them:—*Held*, that the appellant was not liable to be convicted under s. 9 of the Act. Pine *v.* Barnes - - - - - 221

INQUISITION—Amendment—Coroner — Insufficient designation - - - 410
See Coroner.

INSURANCE (FIRE)—Proviso against suing before arbitrator—Condition precedent
See Arbitration. [172

INSURANCE (LIFE)—Policy—Stamp—Promissory note - - - - 645
See Revenue. 6.

INTEREST—Justices—Disqualification — Advice given by justice - - - 58
See Justices.

INTERPLEADER—County Court—Amount not exceeding 20*l.*—Appeal - - 202
See COUNTY COURT.
—— Proceedings—Solicitor—Authority - 164
See SOLICITOR.
INVENTORY—Schedule—Bill of sale—Chattels specifically described - - 114
See BILL OF SALE.

JOINDER—Adding parties—Non-joinder of defendant—Joint contract - - 155
See PRACTICE. 3.
JUDGE'S ORDER—Judgment by consent—Effect of not filing order - - - 321
See PRACTICE. 9.
JUDGMENT—Bankruptcy notice—Act of bankruptcy—Final judgment—Order for dismisssal of action for want of prosecution
See BANKRUPTCY. 5. [512
—— Bankruptcy notice—Final judgment—Order for payment of alimony pendente lite
See BANKRUPTCY. 4. [509
—— Order for dismissal—Action for want of prosecution—Bankruptcy notice - 318
See BANKRUPTCY. 3.
—— Setting aside—Irregularity—Power to impose terms on defendant - - 764
See PRACTICE. 8.
—— Stay of execution — Bankruptcy notice—Garnishee order - - - 690
See BANKRUPTCY. 6.
JUDGMENT DEBT—Costs of issuing abortive execution — Bankruptcy — Petitioning creditor's debt - - - 316
See BANKRUPTCY. 7.
JURISDICTION—Action against churchwarden for preventing inhabitants from entering church - - - - 671
See ECCLESIASTICAL LAW.
—— Justices—Offence committed in one petty sessional division of a county—Committal in different division of same county - - - - 187
See JUSTICES. 2.
—— Mayor's Court—"Carrying on business" 780
See MAYOR'S COURT. 2.
—— Mayor's Court—Contract by telegraph 640
See MAYOR'S COURT.
—— Power to quash coroner's inquisition—Insufficient designation - - 410
See CORONER.

JUSTICES—*Disqualification — Interest — Bias—Advice given by Justice—Attempt to bring about Settlement—Justice summoned as Witness.*] Any pecuniary interest in the subject-matter of the litigation, however slight, will disqualify a magistrate from taking part in the decision of a case. —If a magistrate has such a substantial interest, other than pecuniary, in the result of the hearing, as to make it likely that he will have a bias, he is disqualified.—The fact that a magistrate has been subpœnaed, and that it is intended to call him as a witness at the hearing, is not a legal disqualification, and the High Court will not on that ground prohibit the magistrate from sitting.—A magistrate, who was a surgeon, attended a patient professionally for injury caused by an assault. He endeavoured to induce his patient not to prosecute for the assault, and conveyed to him a message, sent by the person who had committed the assault, offering an apology and suggesting a settlement. A summons was issued for the assault, the magistrate was subpœnaed to give evidence for the prosecution, and a writ of prohibition was obtained to prohibit him from sitting at the hearing. The magistrate moved to set aside the prohibition:—*Held*, that the acts of the magistrate did not shew that he had such a substantial interest in the result as to make it likely that he would have a bias, and that the fact of his being subpœnaed did not disqualify him from sitting, and therefore the prohibition must be set aside. THE QUEEN *v.* FARRANT - - - - - - - 58

2. —— *Jurisdiction—Offence committed in one Petty Sessional Division of a County—Committal in different Division of same County.*] Justices of the peace sitting in and acting for one petty sessional division of a county have jurisdiction to commit for trial on a charge arising in another petty sessional division of the same county, and are not bound to remand such charge for hearing in the division in which the offence was committed. THE QUEEN *v.* BECKLEY . C. C. R. 187

LANDLORD AND TENANT—*Agistment of Cattle —"Live Stock taken in by the tenant of a holding to be fed at a fair price"—Privilege from Distress —Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 45.] Cattle were distrained while on a holding pursuant to an agreement by which the tenant, in consideration of 2*l.*, allowed the owner "the exclusive right to feed the grass on the land for four weeks":—*Held*, that the cattle were not "taken in" by the tenant "to be fed at a fair price," within the meaning of the agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 45, and were therefore not privileged from distress. MASTERS *v.* GREEN - - 807

2. —— *Lease—Agreement for Lease — Forfeiture—Notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.] By an agreement made in 1853 the owner of a house and land agreed to let them for a term of eighty years from the date of the agreement, and to execute a lease thereof for the same term, and the tenant agreed to accept such lease and execute a counterpart, and within eighteen months from the date of the agreement to lay out 100*l.* at least in permanent repairs and improvements to the satisfaction of the owner; and the agreement also provided that the lease should be executed when the 100*l.* had been so laid out, and should contain usual covenants including a covenant to keep the demised premises in good repair, and a proviso for re-entry on breach by the tenant of any of the covenants. No lease was executed. In an action by the reversioner to recover possession of the premises for a forfeiture by reason of the tenant's breach of the covenant to repair:—*Held*, that the agreement did not constitute a "lease" within the meaning of s. 14 of the Conveyancing and Law of Property Act, 1881, and therefore

LANDLORD AND TENANT—*continued.*
that the forfeiture could be enforced without serving upon the tenant the notice required by that section. Swain *v.* Ayres - 585

3. —— *Mortgage—Subsequent Lease by Mortgagor—Notice to pay Rent to Mortgagee—Possession of Tenant after Notice—Tenancy to Mortgagee—Money paid by Compulsion of Law—Rent paid to Mortgagee Money paid for Landlord.*] A mortgagor let the mortgaged premises subsequently to the mortgage. During the quarter ending at Michaelmas the mortgagees gave a notice to the tenant informing him of the existence of the mortgage, and that the principal sum was still due and owing together with an arrear of interest, and requiring him to pay the rent thereafter to accrue due to them. The rent which became due at Michaelmas being still unpaid, an order was made in an action against the mortgagor appointing the plaintiff, who had recovered judgment, receiver of the rents of the premises, "without prejudice to the rights of any prior incumbrancers who may think proper to take possession of the same by virtue of their respective securities." Subsequently the mortgagees threatened the tenant with legal proceedings unless he paid the rent to them, and the tenant thereupon paid them the quarter's rent due at Michaelmas. The receiver claimed payment of such rent from the tenant:—*Held*, by the Queen's Bench Division, that the tenant's occupation after notice to pay rent to the mortgagees was evidence from which a tenancy to the mortgagees ought to be inferred, and therefore he was justified in paying the rent to them, and could not be liable for the same rent to the mortgagor or any one claiming under him:—*Held*, on appeal, by the Court of Appeal, that the tenant had not been guilty of any disobedience of the receivership order in paying rent to the mortgagees, they being prior incumbrancers whose rights were reserved by the order; that the tenant, having paid the rent to the mortgagees under compulsion of law and in consequence of his lessor's default, could not set up such payment in answer to the claim for the rent by the receiver, who claimed through his lessor; and that consequently the claim of the receiver could not be maintained.—*Johnson* v. *Jones* (9 A. & E. 809) approved and followed. Underhay *v.* Read [C. A. 209

—— Agreement for purchase of lease—Constructive notice of covenants in lease - 523
See Vendor and Purchaser.

—— Bankruptcy—Disclaimer of lease — Mortgage by under-lease - - 343
See Bankruptcy. 11.

—— Compensation for tenant's right—Custom of the country—Service out of jurisdiction
See Practice. [147

—— Notice to quit—Ejectment—County Court—Determination of tenancy - 374
See County Court. 5.

LANDS CLAUSES ACTS—Compensation—Lands injuriously affected — Termination of interest of claiment - - 132
See Compensation.

LARCENY—Money deposited to abide event of a wager—Possession obtained by fraud
See Criminal Law. 3. [182

LEASE—Forfeiture — Agreement for lease — Notice - - - - 585
See Landlord and Tenant. 2.

LIBEL—Publication—Communication of libel by husband to wife - - - 635
See Defamation.

LICENSING ACTS—Certificate for licence for sale of beer, cider or wine - - 430
See Inn.

—— Lodger—Sale of intoxicating liquors to—Consumption by guests of lodger during closure of licensed premises - 221
See Inn. 2.

LOCAL GOVERNMENT ACTS—*Officer of Local Authority "concerned or interested in any bargain or contract" with Local Authority—"Allowances" in addition to Salary—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 189, 193, 326.] By the terms of contracts entered into with a local authority for the purposes of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the surveyor to the local authority was to receive from the contractors, in respect of bills of quantities to be prepared by him, percentages on the amounts which he should certify to be due to such contractors respectively by the local authority:—*Held*, by Mathew, J., that in respect of each contract the surveyor was liable to a penalty as having been "concerned or interested" therein within the meaning of s. 193 of the Public Health Act, 1875.—A local authority employed their surveyor, apart from his ordinary duties, to superintend the construction of certain drainage works as their engineer, and agreed to remunerate him by a percentage on the outlay:—*Held*, by Mathew, J., that the surveyor was liable to the penalty imposed by s. 193 of the Public Health Act, 1875. Whiteley *v.* Barley - - - 196

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *Arbitration under—Appointment of Arbitrators invalid—Their appointment of Umpire—Award—Rule of Court, Order* LXI., *r.* 15.] The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180, enacts that "With respect to arbitrations under this Act, the following regulations shall be observed: (1) Every appointment of an arbitrator under this Act when made on behalf of the local authority shall be under their common seal, and on behalf of any other party under his hand . . ." "(2) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same."—In an arbitration under the Act one arbitrator was appointed by the local authority under their common seal, and another arbitrator was appointed by the claimant, but not in writing under his hand. The arbitrators disagreed and appointed an umpire who made an award in favour of the claimant:—*Held*, that the provisions of the statute not having been complied with, the appointment of the arbitrators and consequently their appointment of the umpire, and his award were invalid, and neither the original submission

LOCAL GOVERNMENT ACTS—*continued.*

nor the appointment of the umpire nor the award could be made an order of Court. IN RE GIFFORD AND BURY TOWN COUNCIL - - - 368

3. —— *Sewers—Vesting in Local Authority—Sewer not made for Person's own Profit—Private Street, Sewer in—Frontagers not liable for Expenses of New Sewer where Authority once satisfied with Old Sewer—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 18, 150, 207.] A street having been laid out by the owner of a building estate, a sewer was made by them for the drainage of the houses in the street. Subsequently, in the year 1868, a local board was formed whose district included such street. The sewer, which discharged into the Thames, was sufficient for the purposes of the drainage of the street, assuming that draining into the Thames could be continued. In 1884 the local board, having received notice from the Thames Conservators to discontinue the discharge of sewage into the Thames, gave notice under s. 150 of the Public Health Act, 1875, to the frontagers in the street to make a new sewer, and on their default themselves constructed such sewer and sought to charge the expenses upon the frontagers:—*Held* (affirming the decision of the Queen's Bench Division), that the original sewer was not a sewer made by the owners for their own profit and therefore had vested in the board under the Public Health Act; that, the board, not having taken any steps to compel the frontagers to sewer the street within a reasonable time after the sewer became vested in them, must be taken to have been satisfied with the sewer, and could not afterwards proceed against the frontagers under s. 150, but were bound themselves to keep the sewer in repair under s. 15 of the Public Health Act, 1875, and, if it became necessary, to enlarge or alter it under s. 18; and that consequently the expenses of constructing the new sewer were chargeable not on the frontagers but on the general district rate. BONELLA *v.* TWICKENHAM LOCAL BOARD OF HEALTH. HOLMES *v.* TWICKENHAM LOCAL BOARD OF HEALTH - - - - C. A. 63

4. —— *Highway—Indictment for Non-repair—Urban Sanitary Authority—County Authority—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 10.] An indictment will lie, under s. 10 of the Highways and Locomotives (Amendment) Act, 1878, against an urban sanitary authority, acting as the highway authority of the district, for non-repair of a highway. THE QUEEN *v.* MAYOR, &C., OF WAKEFIELD - 810

LUNATIC — Pauper — Confinement in lunatic asylum—Break of residence - 407
See POOR LAW. 2.

MAN, ISLE OF—Contract to do work in Isle of Man—Service out of jurisdiction 152
See PRACTICE. 2.

MANDAMUS — Convocation—Election of proctor - - - - - - 740
See ECCLESIASTICAL LAW. 4.

—— Return of obedience—Pleading - - 430
See INN.

MARRIAGE — *Breach of Promise of—Action against Personal Representatives of Promisor—Survival of Cause of Action—"Actio personalis moritur cum personâ"—Special Damage.*] An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor.—The special damage which would cause the right of action to survive must be damage to the property, and not to the person, of the promisee, and must be within the contemplation of both parties at the date of the promise, and the action can be brought against the executors for such special damage only, and not for general damages. FINLAY *v.* CHIRNEY C. A. 494

MARRIED WOMAN—Separate estate—Act of bankruptcy - - - - 249
See BANKRUPTCY. 9.

MASTER AND SERVANT—Written character—Action for defacing character—Damages
See DEFAMATION. [635

MAYOR'S COURT — *Jurisdiction — Contract by Telegraph—Order from without the City accepted within it.*] An order to make certain bets having been transmitted by postal telegraph from the plaintiff without the city of London to the defendant within it, he telegraphed from the City that the order had been obeyed:—*Held*, that the contract of agency was made in the City, and that an action for the breach of such contract was within the jurisdiction of the Lord Mayor's Court. COWAN *v.* O'CONNOR - - - - - 640

2. —— *Jurisdiction—Prohibition—20 & 21 Vict. c. clvii. s.* 12—"*Carry on Business*"—*Solicitor's Clerk.*] A clerk employed by a solicitor at offices in the city of London does not "carry on business" there within the meaning of the Mayor's Court Extension Act, 1857 (20 & 21 Vict. c. clvii.), s. 12, so as to be subject to the jurisdiction of the Mayor's Court. LEWIS *v.* GRAHAM [780

3. —— *Practice — Certiorari — Time for lodging Writ with Officer of Mayor's Court—Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *ss.* 16, 17, 19—*Borough and Local Courts of Record Act*, 1872 (35 & 36 *Vict. c.* 86), *Schedule, r.* 12.] By the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 17, "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior court, unless the writ removing such cause shall have been lodged with the proper officer of the court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court."—The defendant applied for an order for the removal of a cause depending in the Mayor's Court by certiorari into the High Court more than one month after the service of the plaint, but before the action had been entered for trial in the Mayor's Court:—*Held*, by Mathew, J., that the cause not having been entered for trial in the Mayor's Court when the application was made, the application was made in time according to the section:—*Held*, by A. L. Smith, J., that the application, not having been made within one

MAYOR'S COURT—*continued.*
month after the service of the plaint in the Mayor's Court, was not made in time according to the section. Prim *v.* Smith - - 554

4. —— *Practice—Certiorari—Time for lodging Writ—The Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *ss.* 16, 17, 19—*Borough and Local Courts of Record Act*, 1872 (35 & 36 *Vict. c.* 86), *Schedule*, *r.* 12.] By the Mayor's Court of London Procedure Act, 1857, s. 17, "No cause depending in the Mayor's Court shall be removed before judgment therein into any superior Court, unless the writ removing such cause shall have been lodged with the proper officer of the Court within one month after the service of the plaint, or unless such writ shall have been lodged with such officer before such action shall have been entered for trial according to the practice of the Mayor's Court:"—*Held* (affirming the judgment of the Queen's Bench Division), that the section gave alternative periods for lodging the writ, and that the defendant could avail himself of whichever was the longer period. Prim *v.* Smith - C. A. 643

METROPOLIS—*Valuation Acts—Provisional List—Assessment Committee—Special Sessions—Appeal—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 47.] An appeal does not lie to special sessions from the determination of the assessment committee on an objection to a provisional list made under s. 47 of the Valuation (Metropolis) Act, 1869. Assessment Committee of Fulham Union *v.* Wells - - 749

MINE—*Wages—Payment by Weight of Mineral—Mode of determining Deductions—Mineral contracted to be gotten—Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 17.] By the Coal Mines Regulation Act, 1872, s. 17, where the amount of wages paid to persons employed in a mine to which the Act applied depends on the amount of mineral gotten by them, such persons are to be paid according to the weight of the mineral gotten by them, subject to deductions in respect of, among other things, "stones or materials other than minerals contracted to be gotten," such deductions to be determined by the banksman or weigher and check-weigher (if there be one). The plaintiffs worked in the defendants' colliery under a contract which declared that the "mineral contracted to be gotten" should be coal of a certain size, which was to be paid for at 1*s.* 6*d.* per ton, that heading slack should be paid for at 7*d.* per ton, and that no other slack should be paid for. The coal was weighed close to the pit's mouth in the presence of the weigher and check-weigher, and was then carried to a distance and thrown on a screen, and the weight of the slack which passed through the screen was ascertained by a person in the defendant's employ. Wages were paid according to the weight of the coal as ascertained at the pit's mouth after deducting therefrom the weight of the slack which had gone through the screen.—In an action to recover the difference between the wages so ascertained and wages computed on the full weight of coal taken by the check-weigher at the pit's mouth:—*Held* (by Lord Esher, M.R., and Lopes, L.J., Fry, L.J., dissenting), that the mineral contracted to be

MINE—*continued.*
gotten within the meaning of the statute was coal, and that slack being a part of such coal deductions in respect of it were unauthorized; that so much of the contract as related to such deductions was void and that the plaintiffs were entitled to recover. Bourne *v.* Netherseal Colliery Company - - - C. A. 606

—— Canal company—Right to support—Compensation for not working mines - 391
See Canal Company.

—— Waterworks — Compensation for minerals not workable - - - 699
See Waterworks.

MISDESCRIPTION—Bill of sale - 773, 775
See Bill of Sale. 7, 8.

MORTGAGE — Personal chattels — Trade machinery—Bill of sale—Departure from statutory forms - - - 310
See Bill of Sale. 2.

—— Subsequent lease by mortgagor—Notice to pay rent to mortgagee—Possession of tenant after notice - - - 209
See Landlord and Tenant. 3.

MUNICIPAL ELECTION—Right to vote—Service franchise - - - - 285
See Parliament. 4.

MUSIC—Composition - - - 378
See Copyright.

NEGLIGENCE—*Liability—Work dangerous to other Persons—Duty to take Precautions—Workman compelled to work in Dangerous Place—Knowledge of Danger—Volenti non fit injuria.*] The plaintiff was a workman, who was directed by his employer to work in a particular place. The defendants were contractors engaged in work above the place where the plaintiff was working. The defendants' work was of such a nature as to be dangerous to persons working below, unless proper precautions were taken for their safety. The plaintiff was aware of the danger. The plaintiff, while working where he was directed by his employer, was injured by a piece of iron dropped by the defendant's workmen, and brought an action to recover damages for the injury.—The jury found that the defendants had been guilty of negligence in not taking proper precautions for those below, that there was no contributory negligence on the part of the plaintiff, and that the plaintiff did not voluntarily incur the risk:—*Held*, that the case was rightly left to the jury, that, although the plaintiff was aware of the danger, yet, as he was compelled by the orders of his employer to work where he was working when the accident happened, the maxim "Volenti non fit injuria" did not apply, and he was entitled to recover.—*Woodley* v. *Metropolitan District Ry. Co.* (2 Ex. D. 384) distinguished. Thrussell *v.* Handyside - - - - - 359

NEGOTIABLE INSTRUMENT—*American Railway Company—Share Certificate—Blank Transfer Power.*] An American railway company, having its sole office in the United States, issued under its seal certificates for its share capital. Each certificate purported to certify that H. & Co., who were the company's correspondents in England, were entitled to twenty shares in the capital

NEGOTIABLE INSTRUMENT—*continued.*

stock of the company "transferable only in person or by attorney on the books of the company." Upon the back of each certificate was indorsed a power of transfer under seal; it was in effect an absolute transfer of the shares represented by the certificate, followed by an irrevocable power of attorney "to the use of the above-named assignee to make and execute all necessary acts of assignment and transfer of the said stock in the books of the company;" this was signed by H. & Co., the names of the transferee and of the attorney being both left in blank. The object of the power was to enable an English holder to appoint an attorney to act for him in America, where alone a transfer could be registered. It was proved that when thus signed in blank these certificates, by the usage of English bankers and dealers in public securities, were transferred by mere delivery, and were dealt with like bonds payable to bearer: —*Held*, by Manisty, J., that the certificates were intended to pass by transfer only and not by mere delivery, and were not negotiable instruments. LONDON AND COUNTY BANKING COMPANY *v.* LONDON AND RIVER PLATE BANK - - 232

NOTICE—Agreement for purchase of lease—Constructive notice of covenants in lease 523
See VENDOR AND PURCHASER.

NOTICE TO QUIT—Ejectment—County court—Determination of tenancy - - 374
See COUNTY COURT. 5.

OBJECTION—To qualification of voter—Description of objector - - - 297
See PARLIAMENT. 5.

OFFICIAL LIQUIDATOR—Action against—Right to stay of action—Unregistered company - - - - - 538
See COMPANY. 3.

PARENT—Maintenance by child—Second marriage - - - - - 252
See POOR LAW.

PARLIAMENT—*Registration—Borough Vote—Freeholder—Residence—Reform Act*, 1832 (2 & 3 *Wm.* 4, *c.* 45), *s.* 31.] The appellant, who claimed to be registered as a voter for the city of Exeter, had a bedroom kept for his exclusive use in his father's house in Exeter. During the qualifying period he went to London in quest of employment, and having obtained a temporary situation in London remained there for two months and then returned to his father's house in Exeter. He remained in Exeter three weeks and then went back to London, and obtaining employment there did not return to Exeter during the rest of the qualifying period:—*Held*, that the facts did not shew a constructive residence in Exeter during the qualifying period within the meaning of the Reform Act, 1832 (2 & 3 Wm. 4, c. 45), s. 31. BEAL *v.* TOWN CLERK OF EXETER - 300

2. —— *Registration — Borough Vote — Disqualification—"Other alms which by the law of Parliament disqualify"—Reform Act*, 1832 (2 & 3 *Wm.* 4, *c.* 45), *s.* 36.] The claimants during the qualifying period occupied almshouses in a borough and received out of a charitable fund for the sustenance of the inmates allowances of

PARLIAMENT—*continued.*

6*s.* a week. The charity was regulated by an Act of Parliament, which provided that the inmates of the almshouses were to be persons "who from age, ill-health, accident, or infirmity should be unable to maintain themselves":—*Held*, that the facts shewed a receipt of "alms which by the law of Parliament disqualify from voting" under the Reform Act, 1832 (2 & 3 Wm. 4, c. 45), s. 36, and that the claimants were not entitled to be registered as voters. EDWARDS *v.* LLOYD - 302

3. —— *Registration—Borough Vote—Residence of Freemen—Notice of Objection—Power of Amendment—Reform Act*, 1832 (2 & 3 *Wm.* 4, *c.* 45), *s.* 32 —*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2.] By the Reform Act, 1832 (2 & 3 Wm. 4, c. 45), s. 32, no freeman of a city or borough is entitled to be registered as a parliamentary voter in any year unless "he shall have resided for six calendar months next previous to the last day of July (now by the Parliamentary and Municipal Registration Act (41 & 42 Vict. c. 26), s. 7, 15th of July) in such year within such city or borough or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken."—A notice of objection was served on a freeman of Norwich dated August 12, and containing as the ground of objection the statement "That you do not reside at 12, Clifton Street, Norwich." The revising barrister held that the notice was sufficient, but amended it by substituting in it the words "That you have not resided at 12, Clifton Street, Norwich, for six calendar months next preceding the 15th day of July next, and that you have not throughout that period resided within the city of Norwich or seven miles thereof":—*Held*, that the notice was bad, and that the defect in it was not a "mistake" within the meaning of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 2, so that the revising barrister had no power to amend. BRIDGES *v.* MILLER [287

4. —— *Registration—Borough Vote—Service Franchise—Municipal Vote—Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9.] Occupation of a dwelling-house by virtue of an office, service, or employment within the meaning of the Representation of the People Act, 1884 (48 Vict. c. 3), s. 3, is no qualification for the municipal franchise. M'CLEAN *v.* PRICHARD [285

5. —— *Registration—Borough Vote—Notice of Objection—Description of Objector—Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 3, *Form* (*I.*), *Nos.* 1 *and* 2.] A notice of objection was signed: "R. B. on the list of parliamentary voters for the parliamentary borough of Battersea and Clapham."—The borough of Battersea and Clapham consists of two divisions, those of Battersea and Clapham, and contains two parishes, those of St. Mary, Battersea, and Clapham. The Battersea division is wholly in the parish of St. Mary, Battersea, the Clapham division is partly in that parish and partly in that of Clapham. The name of the objector was in the list of occupiers for the parish of Clapham in the Clapham division:—

PARLIAMENT—*continued.*

Held, that the notice was insufficient, as it did not state the parish on the list of voters for which the objector's name was to be found. WOOD *v.* CHANDLER - - - - - 297

6. —— *Registration—Borough Vote—Service of Notice of Objection—"Ordinary Course of Post"—6 Vict. c. 18, ss. 17, 100.*] Notices of objection to borough voters under 6 Vict. c. 18, s. 17, were addressed to barracks in which the voters resided, and were posted in time to have been delivered on August 20 by postmen in the ordinary course of post at places within the borough elsewhere than at the barracks. Letters addressed to the barracks were never delivered at the barracks by postmen, but were taken from the post-office by orderlies. On the evening of August 20 the letters addressed to the barracks were taken from the post-office by orderlies. Some of such letters were distributed at the barracks on August 20, others on August 21, while with respect to others there was no evidence as to the time of distribution:—*Held*, that the facts did not shew that there was any "ordinary course of post" to the barracks within the meaning of s. 100, and that therefore there was no evidence that the notices had been served on August 20. CHILDS *v.* COX - 290

7. —— *Registration—County Vote—Notice of Objection—Description of Place of Abode of Objector—Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 2, *Form I., No.* 2.] A notice of objection to a county vote was signed "G. C., of Churchyard, on the list of parliamentary voters for the parish of Petersfield":—*Held*, that the place of abode of the objector was insufficiently described under the Registration Act, 1885 (48 Vict. c. 15), s. 18, Sched. 2, Form I., No. 2. HUMPHREY *v.* EARLE - - - - - - 294

PATENT—Certificate of validity—Appeal—Judicature Act, s. 19 - - - 491
See PRACTICE. 11.

PAWNBROKER—*Detention of Person offering Article to pawn—Reasonable Suspicion that Article was stolen—Pawnbrokers Act*, 1872 (35 *&* 36 *Vict. c.* 93), *s.* 34.] By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 34, in any case where, on an article being offered in pawn to a pawnbroker he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, he may seize and detain the person so offering the article and the article, or either of them, and shall deliver the person and the article, or either of them (as the case may be) as soon as may be into the custody of a constable.—The plaintiff offered in pawn to the defendant, a pawnbroker, a gold horse-shoe pin, set with seven diamonds, and a ring. The defendant, having previously received from the police a notice of articles recently stolen, amongst which was "a gold horse-shoe pin, set with seven diamonds," and a ring, asked the plaintiff if he was a dealer. He replied that he was not. The defendant also asked the plaintiff where he obtained the articles. The plaintiff said that he got them from a publican, whose name and address he stated. The defendant gave the plaintiff into custody of a constable. It was afterwards proved that the articles in the possession of the plaintiff had not been stolen, and that his statements were true. In an action by him

PAWNBROKER—*continued.*

for false imprisonment the judge left the question whether the defendant had a reasonable suspicion to the jury, who found their verdict for the plaintiff:—*Held*, that the question arising under the Act whether the defendant reasonably suspected that the pin had been stolen or otherwise illegally or clandestinely obtained was for the judge; that, on the facts, there was no evidence of absence of reasonable suspicion in the mind of the defendant, and therefore judgment should be entered for him. HOWARD *v.* CLARKE - - - - 558

PAYMENT INTO COURT—Defence setting up tender—Denial of liability—Continuance of action—Payment out of court
See PRACTICE. 7. [722

PENALTY—Local Government Acts—Officer interested in contract with local authority - - - - - 196
See LOCAL GOVERNMENT ACTS.

POOR LAW—*Relief—Second Marriage—Liability of Children of First Marriage to maintain Mother living with Second Husband—43 Eliz. c.* 2, *s.* 7; 4 *&* 5 *Wm.* 4, *c.* 76, *ss.* 56, 57.] A woman and her second husband became chargeable to a parish, and received from it a weekly sum as outdoor relief, which was paid to the husband:—*Held*, that the children of the woman by a former husband were liable under 43 Eliz. c. 2, s. 7, to relieve and maintain her, and therefore to contribute towards such relief for her maintenance, and that their liability was not affected by 4 & 5 Will. 4, c. 76, s. 56, enacting that all relief to a wife shall be considered as given to her husband. ARROWSMITH *v.* DICKENSON - - - 252

2. —— *Removal of Pauper—Status of Irremoveability—Lunatic—Break of Residence—9 & 10 Vict. c.* 66, *s.* 1.] The husband of the pauper had resided in the respondent union continuously for upwards of three years. During part of this time the pauper was in lunatic asylums, where she was maintained as a pauper lunatic, but in lucid intervals, the aggregate of which amounted to more than a year, she lived with her husband in the respondent union. The husband did not during his residence receive parish relief otherwise than in respect of the maintenance of his wife as a pauper lunatic:—*Held*, that the husband was irremoveable, for the periods during which he did not receive parish relief could be put together in order to constitute a year's residence by him under 9 & 10 Vict. c. 66, s. 1, and 28 & 29 Vict. c. 79, s. 8, and that the pauper took her husband's status of irremoveability. GUARDIANS OF IPSWICH UNION *v.* GUARDIANS OF WEST HAM UNION - - - - - - 407

3. —— *Settlement—"Widowed Mother," Second Marriage—Child under Sixteen—Divided Parishes Act*, 1876 (39 *&* 40 *Vict. c.* 61), *s.* 35.] A pauper under the age of sixteen, whose father was dead and whose mother had married again without having acquired a settlement for herself during her widowhood, became chargeable to the respondent union, and an order was made for her removal into the appellant union, in which her mother had been born:—*Held*, that the order was bad; that at the time of the making of the order of removal the pauper had no "widowed

POOR LAW—*continued.*

mother" within the meaning of s. 35 of the Divided Parishes Act, 1876, whose settlement she could take, and that the pauper took her own birth settlement. GUARDIANS OF THE POOR OF AMERSHAM UNION *v.* GUARDIANS OF POOR OF CITY OF LONDON UNION - - - 103

4. —— *Settlement — Residence as Wife and Widow—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35—9 & 10 *Vict. c.* 66, *s.* 1—*Union Chargeability Act*, 1865 (28 & 29 *Vict. c.* 79), *s.* 8.] The pauper resided continuously for three years in a parish in the appellant union, two years and nine months with her husband as his wife, and three months after his death as a widow:—*Held*, that the two periods of residence could be put together to make up the term of three years' residence required by s. 34 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), and that the widow had acquired a settlement in the appellant union. GUARDIANS OF MEDWAY UNION *v.* GUARDIANS OF BEDMINSTER UNION 191

5. —— *Settlement of Child under Sixteen—Derivative Settlement from Father—Retention of such Settlement after Sixteen — Acquisition of another Settlement — Settlement by Residence — Emancipation—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.] On an inquiry into the settlement of a pauper it appeared that she resided with her father till his death, and then, in the same parish, with her mother, who married again before the pauper arrived at the age of sixteen. After she attained that age the pauper continued to reside in the same parish with her mother and stepfather for two years and eight months, when she became chargeable. She was at that time and always had been physically incapable of work:—*Held*, that the effect of s. 35 of the Divided Parishes Act, 1876, is that every child on attaining the age of sixteen is for the purposes of settlement emancipated, and capable of acquiring a settlement, but that the pauper could not while under sixteen "reside" for any part of the period required for a settlement by residence under s. 34, and (reversing the decision of the Queen's Bench Division) that as any settlement acquired by the mother on re-marriage was not communicated to the pauper, and she had not resided after attaining sixteen for three years so as to acquire a settlement by residence under s. 34, she still retained the derivative settlement she had taken from her father while under that age. GUARDIANS OF HIGHWORTH AND SWINDON UNION *v.* GUARDIANS OF WESTBURY-ON-SEVERN UNION - - - - - C. A. 597

—— Trade union—Right of guardians to reimbursement by, as a benefit society 412
See TRADE UNION.

POOR-RATE — *Borough-rate—County-rate—Deficiency in Assessment to Poor-rate—Liability of Promoters of Undertaking—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 133—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 145, *sub-s.* 1—15 & 16 *Vict. c.* 81, *s.* 26, *and Schedule—Union Chargeability Act*, 1865 (28 & 29 *Vict. c.* 79), *s.* 11—*Consolidated Order Amendment Order of Poor Law Board, Feb.* 26, 1866.] By s. 133 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), the promoters of the undertaking are to make good the deficiency in the assessment for poor-rate arising from their being in possession of lands liable to be assessed thereto:—*Held* that, the borough-rate (under 45 & 46 Vict. c. 50, s. 145) and the county-rate (under 15 & 16 Vict. c. 81, s. 26) being respectively made chargeable on the poor-rate, the deficiency in the assessment for the poor-rate, which the promoters of the undertaking are liable to make good, includes any deficiency in respect of amounts raised for borough-rate and county-rate, as well as any deficiency in the assessment for poor-law purposes properly so called. FARMER *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - 788

2. —— *Rateability of Premises occupied as certified Reformatory School—Reformatory Schools Act*, 1866 (29 & 30 *Vict. c.* 117), *s.* 4.] A reformatory school, which has been certified under the Reformatory Schools Act, 1866, is rateable to the poor-rate.—*Sheppard* v. *Bradford* (16 C. B. (N.S.) 369; 33 L. J. (M.C.) 182) overruled. TUNNICLIFFE *v.* OVERSEERS OF BIRKDALE - C. A. 450

—— Metropolis—Assessment committee—Valuation Acts — Provisional list — Special sessions—Appeal - - - 749
See METROPOLIS.

POSSESSION MONEY—Execution—County court —High bailiff's fees - - 727
See COUNTY COURT. 4.

POST-OFFICE—Service of notice of objection—"Ordinary course of post" - 290
See PARLIAMENT. 6.

PRACTICE—*Writ—Service out of Jurisdiction—Contract affecting Land, what is—Landlord and Tenant—Compensation for Tenant-right—Custom of the Country—Order* XI., *r.* 1 (*b*) (*e*).] In an action by the outgoing tenant of a farm in Yorkshire to recover from his landlord, who was ordinarily resident in Scotland, compensation for tenant-right according to the custom of the country:—*Held*, that a "contract, obligation, or liability affecting land" was sought to be enforced in the action, and therefore that the Court had power, under Order XI., r. 1 (b), to allow service of the writ of summons out of the jurisdiction.—*Agnew* v. *Usher* (14 Q. B. D. 78) distinguished. KAYE *v.* SUTHERLAND - - - 147

2. —— *Writ—Service out of Jurisdiction—Work done in Isle of Man—Place of Payment—Order* XI., *r.* 1 (*e*).] In an application for service out of the jurisdiction it appeared that the action was brought by the plaintiffs, engine-makers in England, for the price of machinery erected by them in the Isle of Man for the defendants, a company carrying on business in the island.—There was no agreement as to the place of payment:—*Held*, that it must be taken to be part of the contract that the plaintiffs should receive payment in England, that the action was therefore founded on a breach within the jurisdiction, according to Order XI., r. 1 (*e*), and that service out of the jurisdiction might be allowed. ROBEY *v.* SNAEFELL MINING COMPANY - - 152

3. —— *Adding Parties—Non-joinder of Defendant—Joint Contract—Rules of Supreme Court,*

PRACTICE—*continued.*

1883, *Order* XXI., *r.* 20; *Order* XVI., *r.* 11.] Where an action is brought against one only of several joint contractors the defendant is entitled as of right, under Order XVI., r. 11, to have his co-contractors joined as defendants:—So *held* by Stephen and Charles, JJ., on the authority of *Kendall* v. *Hamilton* (4 App. Cas. 504). PILLEY *v.* ROBINSON - - - - - 155

4. —— *Appeal — Jurisdiction — "Criminal Cause or Matter"—Habeas Corpus—Extradition Proceedings—Extradition Act.* 1870 (33 & 34 *Vict. c.* 52)—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.] The Queen's Bench Division having refused an application for a writ of habeas corpus made on behalf of a person who had been committed to prison under s. 10 of the Extradition Act, 1870, as a fugitive criminal accused of an extradition crime:—*Held*, that the decision of the Queen's Bench Division was given in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and therefore that no appeal would lie to the Court of Appeal. EX PARTE ALICE WOODHALL - - C. A. 832

5. —— *Appeal—Security for Costs—Abuse of the Process of the Court—Order* LVIII., *r.* 15.] The Court of Appeal will order that security be given for the costs of an appeal upon facts which establish a primâ facie case of an abuse, or a threatened abuse, by the appellant of the process of the Court. WELDON *v.* MAPLES, TEESDALE & Co. - - - - - C. A. 331

6. —— *Contempt of Court—Judge at Chambers—Abuse and Threatening Gestures used towards Solicitor after Hearing of Application at Chambers—Interference with Course of Justice.*] A solicitor, who had attended the hearing of an application before a judge at chambers in the Royal Courts of Justice, immediately after such hearing and while the parties were on their way from the judge's room to the entrance gate of the building, made use of grossly abusive expressions and threatening gestures to the solicitor on the other side in relation to such application.—*Held*, that such conduct in relation to proceedings before a judge at chambers was a contempt of Court punishable by attachment.—*Ex parte Wilton* (1 Dowl. N.S. 805) discussed. IN RE JOHNSON [C. A. 68

7. —— *Payment into Court—Defence setting up Tender—Denial of Liability—Continuance of Action — Payment out of Court — Necessity for Order—Rules of Supreme Court*, 1883, *Order* XXII., *rr.* 5, 6.] In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant pleaded that the plaintiff was only entitled to one month's notice, or in the alternative three months; that before action the defendant made tender of three months' salary, which the plaintiff refused; that the defendant had paid the said sum into court, and that it was enough to satisfy the plaintiff's claim.—The plaintiff, without obtaining an order, took the money out of court, and proceeded with the action; at the trial judgment was given for the defendant on the ground that the plaintiff was only entitled to one month's salary.—The defendant applied for an order for payment to the defendant of a part of the money which had been paid out of court:—

PRACTICE—*continued.*

Held, that, the action being for unliquidated damages, the payment into court was not made with a defence setting up a tender of the sum paid, within the meaning of Order XXII., r. 5 (*c*), and, further, that as the defendant's liability was denied, and the plaintiff did not accept the sum paid into court in satisfaction, but proceeded with the action, the case was within rule 6 (*c*), and not rule 5 of Order XXII., and therefore the money ought not to have been paid out of court except in pursuance of an order, and the defendant was entitled to an order for payment. DAVYS *v.* RICHARDSON - - - - - 722

8. —— *Defence, Time for delivery of—Specially indorsed Writ—Irregular Judgment, setting aside—Power to impose Terms on Defendant—Orders* III., *r.* 6; XX., *r.* 1; XXI., *rr.* 7, 8; LXX., *r.* 1.] The service of a writ specially indorsed under Order III., r. 6, is delivery of a statement of claim to the defendant within the meaning of Order XXI., r. 6; so that the defendant has ten days from the time limited for appearance within which to deliver his defence.—Where a plaintiff has obtained judgment irregularly, the defendant is entitled ex debito justitiæ to have such judgment set aside; and the Court has only power to impose terms upon him as a condition of giving him his costs. So *held* by Fry and Lopes, L.JJ., reversing the decision of the Queen's Bench Division. ANLABY *v.* PRÆTORIUS - C. A. 764

9. —— *Judge's Order for Judgment by Consent—Effect of not filing Order in accordance with Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 27—*Payment by Garnishee under void Judgment—Trustee in Bankruptcy, Money received to use of.*] The 27th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), provides that a judge's order for judgment, made by consent of the defendant in a personal action, shall be filed in the manner required by the section within twenty-one days after the making thereof, otherwise the order and any judgment signed or entered up thereon and any execution issued or taken out on such judgment shall be void.—The defendant in an action consented to a judge's order for judgment against him, which was accordingly signed, and, a garnishee order having been made upon the judgment, the garnishee paid the debt attached to the judgment creditors before the expiration of twenty-one days from the date of the making of the judge's order. The order was not filed as required by the above-mentioned section.—The defendant subsequently committed an act of bankruptcy, and was thereupon adjudged bankrupt:—*Held*, that, although the moneys attached under the judgment had already been paid to the judgment creditors before the act of bankruptcy, nevertheless, the judgment being avoided by failure to file the judge's order, the trustee in bankruptcy was entitled to recover from the judgment creditors the amount paid to them by the garnishee as money received to his use.—In the absence of fraud, the payment by the garnishee discharges him, although the judgment is afterwards set aside. IN RE SMITH. EX PARTE BROWN C. A. 321

10. —— *Costs—Taxation—Trial with a Jury—Claim and Counter-claim—"Event"—Entry of Judgment—Taxation where Plaintiff succeeds on*

PRACTICE—*continued.*

Claim and Defendant on Counter-claim—Orders XXI., r. 17; LXV., r. 1.] In an action tried with a jury, where the defendant counter-claims in respect of matters which could not be pleaded as set-off, and the plaintiff recovers a sum on his claim, and the defendant recovers on his counter-claim a sum exceeding that which the plaintiff recovers on his claim, the claim and counter-claim should, for the purpose of taxation of costs, be treated as separate and independent actions, and the costs in each taxed in favour of the successful party, subject to a deduction in respect of the costs of any issues on which he has not succeeded. In such a case it is immaterial, with respect to the taxation of costs, whether the judgment is drawn up in form for the plaintiff for the sum recovered on his claim, and for the defendant for the sum recovered on his counter-claim; or whether judgment is given for the defendant for the balance under Order XXI., r. 17.—Decision of the Queen's Bench Division affirmed. SHRAPNAL *v.* LAING - - - - **C. A. 334**

11. —— *Patent—Certificate of Validity—Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 31.] By s. 31 of the Patents, Designs and Trade Marks Act, 1883, in an action for infringement of a patent, the Court or a judge may certify that the validity of the patent came in question:—*Held*, that such a certificate is not a judgment or order against which an appeal lies to the Court of Appeal under s. 19 of the Judicature Act, 1873. HASLAM *v.* FOUNDRY AND ENGINEERING COMPANY *v.* HALL **[C. A. 491**

—— Appeal to Court of Appeal—Habeas corpus *See* ECCLESIASTICAL LAW. 3. **[1**

—— Certiorari—Mayor's Court—Time for lodging writ - - - - - **643**
See MAYOR'S COURT.

—— Certiorari — Time for lodging writ with officer of Mayor's Court - - **554**
See MAYOR'S COURT. 3.

—— County Court—Action in High Court—Claim exceeding 50*l.* — Reduction by admitted set-off — Order for trial in County Court - - - **56**
See COUNTY COURT. 7.

—— County Court—Remitted action—Parties—Power of county court judge to add defendant - - - - **667**
See COUNTY COURT. 8.

—— Jurisdiction of Queen's Bench Division—Power to quash inquisition - **410**
See CORONER.

—— Solicitor—Bill of costs—Order for delivery — Business not transacted in court—Jurisdiction - - - **656**
See SOLICITOR. 3.

—— Solicitor—Costs—Charging order—Lien—Property recovered or preserved - **693**
See SOLICITOR. 4.

—— Special case—Lands Clauses Act—Costs incidental to arbitration—Court of appeal—Jurisdiction over costs - **699**
See WATERWORKS.

PRACTICE—*continued.*

—— Stay of action—Winding-up—Official liquidators — Action against, in personal capacity - - - - **683**
See COMPANY. 4.

PRIVILEGE—Libel—Matter of public interest
See DEFAMATION. 2. **[275**

PROHIBITION—County court—Jurisdiction of home court over high bailiff in foreign court - - - - **242**
See COUNTY COURT. 6.

—— County court—Receiver—Fund in discretion of trustees—Order against trustees for payment—Excess of jurisdiction **167**
See RECEIVER.

PROMISE—Breach of promise—Action against personal representatives of promisor
See MARRIAGE. **[494**

PROMISSORY NOTE—Stamp duty—Agreement
See REVENUE. 6. **[645**

—— Validity—Amount secured by void bill of sale - - - - - **785**
See BILL OF SALE. 9.

PUBLICATION—Libel—Communication of libel by husband to wife - - **635**
See DEFAMATION.

RAILWAY—*Highway carried over Railway by means of Bridge—Repairs of Roadway of Bridge—Obligation of Company—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 46.] Where a railway crosses a highway, and the road is carried over the railway by means of a bridge in accordance with the provisions of s. 46 of the Railways Clauses Consolidation Act, 1845, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the section the company are to maintain. MAYOR, &C. OF BURY *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY **[C. A. 485**

—— Lands injuriously affected—Compensation—Termination of interest of claimant—Prospective damage - - **132**
See COMPENSATION.

—— Share certificate—Negotiable instrument—American railway company - **232**
See NEGOTIABLE INSTRUMENT.

RECEIVER—*Fund in Discretion of Trustees—Order against Trustees for Payment—Excess of Jurisdiction—Prohibition*] An order was made, in an action in a county court, appointing a receiver to receive the interest of a sum of money in the hands of trustees, and ordering the trustees to pay a specific amount out of the interest to the receiver half-yearly until the judgment in the action should be satisfied.—The trustees were trustees of a will, by which they were directed to set apart and invest the sum in question, and were authorized, at their absolute discretion, from time to time, and at such time or times as they should think proper, to pay or apply the whole or any part of the income to or for the benefit of the judgment debtor in such a manner in all respects as they should think proper.—The trustees applied for a prohibition:—*Held*, that, as it depended on the discretion of the trustees

RECEIVER—*continued.*
whether anything should be paid to the judgment debtor, the receiver could not be entitled to receive the interest in their hands, and that an order for payment could not be made against the trustees, who were strangers to the action, and therefore the county court judge had exceeded his jurisdiction, and the proper remedy was by prohibition. THE QUEEN *v.* JUDGE OF THE COUNTY COURT OF LINCOLNSHIRE - - - 167

REFORMATORY — Rateability—Premises occupied as reformatory school - 450
See POOR-RATE. 2.

REGISTER—Bill of sale—Affidavit—Accidental omission of particulars prescribed by the Act—Rectification of omission - 535
See BILL OF SALE. 5.

REGISTRATION — Bill of sale—Misdescription of occupation of grantor - - 773
See BILL OF SALE. 7.

—— Bill of sale — Misdescription of name of grantor - - - - 775
See BILL OF SALE. 8.

RELEASE—Assignment of property to trustee for the benefit of creditors generally—Right of party to the assignment to prove in bankruptcy - - 540
See BANKRUPTCY.

REMITTED ACTION—County court—Power to add defendant - - - 667
See COUNTY COURT. 8.

REVENUE—*Bodies corporate or unincorporate—Income or Profits of Property—Duty—Exemption — Appropriation for Promotion of Science — Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-s.* 3.] By s. 11 of the Customs and Inland Revenue Act, 1885, a duty is imposed upon the annual value, income, or profits of property belonging to any body corporate or unincorporate, subject to an exemption in favour of property which, or the income or profits whereof, shall be legally appropriated and applied "for the promotion of education, literature, science, or the fine arts":—*Held* (by Lord Esher, M.R., and Fry, L.J., Lopes, L.J., dissenting, reversing the decision of the Queen's Bench Division), that the property of the Institution of Civil Engineers was entitled to the benefit of the exemption, as it was property which was appropriated and applied for the promotion of science. IN RE DUTY ON ESTATE OF INSTITUTION OF CIVIL ENGINEERS - - - - C. A. 621

2. —— *Income Tax — Duty on Income from Lands — Deduction for Cost of Embankment to protect Lands against Encroachment of Tidal River—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Sched. A., s.* 37.] The Income Tax Act, 1853, s. 37, enacts that in charging duty under Sched. A. in respect of lands a deduction shall be made for the amount expended by the owner, on an average of the twenty-one preceding years, in the making or repairing of embankments "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river."—Prior to 1880 the appellant was owner of salt marshes adjoining a tidal river and liable to be flooded at every tide, and he was assessed to the income

REVENUE—*continued.*
tax in respect of the small yearly value of the pasturage. The appellant having in 1880 expended a large sum in making an embankment so that the tidal water was excluded and the marshes became valuable inclosed land yielding a large income:—*Held*, that such sum was not expended in making an embankment "necessary for the preservation or protection" of the land against the encroachment or overflowing of the tidal river within the meaning of s. 37, because that section did not apply to sums expended in order to increase the capital value of the land to the owner by altering its condition, and therefore that the appellant was not entitled to any deduction from income tax in respect thereof. HESKETH *v.* BRAY - - - - - 589

3. —— *Income Tax—Tithe Commutation Rent-charge—"Annual Value"—Expenses of Collection —5 & 6 Vict. c.* 35—16 *&* 17 *Vict. c.* 34.] In estimating the "annual value" of tithe commutation rent-charge for the purpose of charging the owner thereof with property tax under 16 & 17 Vict. c. 34, s. 32, the amount necessarily expended by him in collection of the tithe rent-charge must be deducted. STEVENS *v.* BISHOP C. A. 442

4. —— *Income Tax—Repayment of Income Tax—Computation of Profits—"Shall find and shall prove within or at the end of the year of Assessment"*—5 *&* 6 *Vict. c.* 35, *s.* 133—23 *Vict.* c. 14, *s.* 10.] By 5 & 6 Vict. c. 35, s. 133, income tax assessed under Schedule D is to be repaid "if" the person assessed "within or at the end of the year" of assessment "shall find and shall prove to the satisfaction of the Commissioners by whom the assessment was made" that his profits during the year for which the computation was made fell short of the sum at which they were assessed.—By s. 10 of 23 Vict. c. 14, no claim for repayment of income tax is to be allowed unless made within three years of the year of assessment to which it relates.—In March, 1887, the appellants made a claim for repayment of income tax assessed on profits for the years ending April, 1884, April, 1885, and April, 1886. They did not shew that it was more difficult to "discover and prove" diminution of profits as regards the years ending April, 1884, and April, 1885, than as regards the year ending April, 1886:—*Held*, by CAVE, J., that s. 10 of 23 Vict. c. 14, did not apply, that under s. 133 of 5 & 6 Vict. c. 35, the appellants were bound to use reasonable diligence to "discover and prove" diminution of profits "within or at the end of the years" of assessment in question, and that, as the circumstances of the case did not shew that they had used such reasonable diligence, they were not entitled to any repayment in respect of the income tax for the years 1884 and 1885.—By GRANTHAM, J., that s. 10 of 23 Vict. c. 14, applied, and that the appellants having made their claim within three years of the two years in question, were entitled to repayment in respect of the income tax for such two years respectively. THE QUEEN *v.* COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX - - - - 549

5. —— *Income Tax—Trade exercised within United Kingdom—Foreigner resident abroad—* 16 *&* 17 *Vict. c.* 34; 5 *&* 6 *Vict. c.* 35.] The ap-

REVENUE—*continued.*

pellants, a firm of wine merchants at Rheims, employed a London firm to obtain orders for their wine in England. The wine was advertised in England, and the London firm issued circulars from time to time with the authority of the appellants detailing the price and terms of sale. The name of the appellants' firm was put up at the business premises of the London firm and was published in the London Directory with that address. The appellants had no wine in England, and all orders were forwarded to Rheims, and the wine, invoiced in the appellants' name, was packed and sent direct from thence to the customer at his expense and risk. Payments were either made direct to the appellants or to the London firm, who remitted the amount to the appellants without carrying it to any current account. Any bill drawn for payment of wine was sent to the London firm to obtain the acceptance and to hold for the appellants. Formal receipts were sent by the appellants to purchasers for all payments, whether made direct or through the London firm. The London firm were paid by a commission on all wine sold, and the appellants alone were interested in the gain or loss on the sales.—*Held*, that the appellants exercised a trade within the United Kingdom within Schedule D. of 16 & 17 Vict. c. 34, and were assessable to the income tax in respect of the profits arising therefrom. WERLE *v.* COLQUHOUN - - - - C. A. 753

6. —— *Stamp Duty—Promissory Note—Agreement—Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *s.* 49.] By an instrument headed "Policy of Insurance," after reciting that E. was desirous of being insured with the appellant corporation, and that there had been paid to the corporation 9*l.* 17*s.* 4*d.*, being the agreed premium for such assurance, it was witnessed that the corporation did thereby guarantee to the assured payment of the sum of 100*l.* on May 18, 1976; provided that if the assured should be desirous at any time of surrendering the policy, the corporation would allow to him the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders:—*Held*, that, for the purposes of the Stamp Act, 1870, this instrument required to be stamped as an agreement, and not a promissory note. MORTGAGE INSURANCE CORPORATION *v.* COMMISSIONERS OF INLAND REVENUE - - - - 645

RIPARIAN OWNER—Conveyance—Bed of river ad medium filum—Rebuttal of presumption - - - - 263
See CONVEYANCE, CONSTRUCTION OF.

RIVER—Grant of riparian land—Bed of river ad medium filum—Presumption - 263
See CONVEYANCE, CONSTRUCTION OF.

RULES—Order III., r. 6 - - - 764
See PRACTICE. 8.

—— Order XI., r. 1 (b) (e) - - - 147
See PRACTICE.

—— —— —— (e) - - - - 152
See PRACTICE. 2.

—— Order XVI., r. 11 - - - 155
See PRACTICE. 3.

RULES—*continued.*

—— Order XX., r. 1 - - - - 764
See PRACTICE. 8.

—— Order XXI., rr. 6, 7 - - - 764
See PRACTICE. 8.

—— —— r. 17 - - - - 334
See PRACTICE. 10.

—— —— r. 20 - - - - 155
See PRACTICE. 3.

—— Order XXII., rr. 5, 6 - - - 722
See PRACTICE. 7.

—— Order XXVII., r. 1 - - - 318
See BANKRUPTCY. 3.

—— —— —— - - - - 727
See COUNTY COURT. 4.

—— Order XLII., r. 15 - - - 316
See BANKRUPTCY. 7.

—— —— rr. 22, 23 - - - - 690
See BANKRUPTCY. 6.

—— Order LVIII., r. 15 - - - 331
See PRACTICE. 5.

—— Order LXI., r. 15 - - - 368
See LOCAL GOVERNMENT ACTS. 2.

—— Order LXV., r. 1 - - - 334
See PRACTICE. 10.

—— Order LXX., r. 1 - - - 764
See PRACTICE. 8.

SALE OF GOODS—*Stoppage in transitu—Goods bought for Shipment Abroad—Delivery of Goods on board Ship—Termination of Transit.*] Goods having been purchased by merchants in London of manufacturers in Wolverhampton, the purchasers wrote to the vendors asking them to consign the goods "to the *Darling Downs*, to Melbourne, loading in the East India Docks." The goods were accordingly delivered by the vendors to carriers to be forwarded to the ship. The vendors being subsequently informed of the purchasers' insolvency gave notice to the carriers to stop the goods, but too late to prevent their shipment on board the *Darling Downs*. The ship sailed with the goods on board for Melbourne, but before she arrived the vendors claimed the goods from the shipowners as their property:—*Held*, affirming the judgment of the Queen's Bench Division, that the transit was not at an end till the goods reached Melbourne, and therefore that the vendors had till then a right to stop them in transitu. BETHELL *v.* CLARK C. A. 615

2. —— *Warranty—Sale of Horse—Condition for Return—Horse disabled—Non-return—Implied Condition.*] The plaintiff bought a horse of the defendant warranted quiet to ride. One of the conditions of the contract was to the effect that if the buyer contended that the horse did not correspond with the warranty it must be returned on the second day after the sale, and that the non-return within the time limited should be a bar to any claim on account of any breach of warranty.—The horse was removed by the plaintiff, and while being ridden, fell, and was so injured that it could not safely be returned on the second day after the sale, but the plaintiff gave notice to the defendant on that day that the animal was not according to warranty, and was unfit to

SALE OF GOODS—*continued.*
travel:—*Held*, that, under these circumstances, the non-return of the horse within the period stipulated by the condition was no bar to an action for breach of the warranty. Chapman *v.* Withers [824
—— Damages, measure of—Breach of warranty—Sub-sale with similar warranty—Costs of action by sub-vendee against the purchaser reasonably defended - 79
See Damages, Measure of.
SECURITY FOR COSTS—Appeal—Abuse of the process of the Court - - 331
See Practice. 5.
—— Bankruptcy—Proof by creditors resident abroad—Bankruptcy Rules, 1883, rr. 131, 148 - - - - - 146
See Bankruptcy. 12.
SEPARATE ESTATE—Husband and wife—Debt contracted after marriage—Non-trader—Bankruptcy notice - - - 249
See Bankruptcy. 9.
—— Married woman—Order of committal—County court - - - 120
See Husband and Wife. 3.
SEPARATION—Husband and wife—Action by wife for money due under agreement for separation—Power of wife to contract without intervention of trustee - 529
See Husband and Wife. 2.
SERVICE—Out of jurisdiction—Contract affecting land - - - - 147
See Practice.
—— Out of jurisdiction—Work done in Isle of Man - - - - - 152
See Practice. 2.
SET-OFF—Claim exceeding 50*l.*—Reduction by admitted set-off—Order for trial in county court - - - 56
See County Court. 7.
SETTLEMENT—Bankruptcy—Void settlement—Costs of trusts of settlement—Lien on trust fund - - - - 43
See Bankruptcy. 13.
—— Bankruptcy—Purchaser for valuable consideration—Dealing with bankrupt in good faith and for valuable consideration - - - - - 732
See Bankruptcy. 14.
—— Child under sixteen—Emancipation 597
See Poor Law. 5.
—— Poor law - - - - - 103
See Poor Law. 3.
—— Residence as wife and widow - - 191
See Poor Law. 4.
SEWER—Vesting in local authority—Sewer not made for person's own profit—Private street, sewer in - - - 63
See Local Government Acts. 3.
SHERIFF—*Under-sheriff—Death of Sheriff—Vacancy of Shrievalty—Liability of Under-sheriff for Proceeds of Execution*—3 *Geo.* 1, *c.* 15, *s.* 8.] Where an under-sheriff (since deceased) acting as sheriff during the vacancy of the shrievalty under 3 Geo. 1, c. 15, s. 8, wrongfully retained the proceeds of an execution:—*Held* (affirming the
SHERIFF—*continued.*
judgment of the Queen's Bench Division), that an action for money had and received was maintainable against the executor of the under-sheriff by the execution creditors to recover the sum so wrongfully retained. (See now the Sheriffs' Act, 1887 (50 & 51 Vict. c. 55), s. 25). Gloucestershire Banking Company *v.* Edwards **C. A. 107**
—— Execution—Costs—Bankruptcy—Expenses incurred for benefit of property seized
See Bankruptcy. 10. [40
SHIP—*Bill of Lading—Contract contained in—Evidence to vary Terms of—Deviation—Loss by Perils of the Sea—Bills of Lading Act*, 1855 (18 & 19 *Vict. c.* 111), *s.* 1.] The plaintiffs having purchased goods to be shipped from a foreign port on the terms that payment of the price was to be made in exchange for shipping documents, the bill of lading signed upon the shipment of the goods was, upon payment of the price, indorsed to them. The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any ports in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, and was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. In an action brought by the plaintiffs against the shipowners for non-delivery of the goods, evidence was given to shew that the shippers of the goods, at the time when the bill of lading was given, knew that the vessel was intended to proceed viâ Glasgow:—*Held*, that such evidence was not admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such voyage; that Glasgow, being altogether out of the course of such voyage, was not such a port; and that the vessel was therefore lost while deviating from the voyage contracted for, and the excepted perils clause did not exonerate the defendants from liability in respect of non-delivery of the goods. Leduc *v.* Ward - - **C. A. 475**
SOLICITOR—*Authority—Employment to collect a Debt—Proceedings in Interpleader.*] A solicitor who has recovered judgment for a client under an ordinary retainer, has no authority, without special instructions, to engage in proceedings in interpleader. James *v.* Ricknell - - 164
2. —— *Bill of Costs—Order for Delivery—Business not transacted in Court—Jurisdiction—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.] The power to order delivery of a solicitor's bill of costs, where no part of the business contained in such bill has been transacted in any court, which was conferred on the Lord Chancellor and the Master of the Rolls by s. 37 of the Solicitors Act, 1843, has not been transferred by any subsequent legislation, and a judge of the Queen's Bench Division has no jurisdiction to order delivery of a bill of costs in such a case. In re Pollard [160
3. —— *Bill of Costs—Order for Delivery—Business not transacted in Court—Jurisdiction—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—

SOLICITOR—*continued.*

Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 16.] The jurisdiction given by s. 37 of the Solicitors Act, 1843, to order delivery of a solicitor's bill of costs where no part of the business charged for has been transacted in any court of law or equity, was given to the Lord Chancellor and Master of the Rolls as judges of the Court of Chancery, and was transferred to the High Court of Justice by s. 16 of the Judicature Act, 1873. The judges of the Queen's Bench Division, therefore, have jurisdiction to order delivery of a bill of costs in such a case; though the application for delivery ought to be made in the Chancery Division.— So *held* by Fry and Lopes, L.JJ., Lord Esher, M.R., dissenting.—Decision of the Queen's Bench Division reversed.—By Lord Esher, M.R.: Sect. 37 of the Solicitors Act, 1843, gave the jurisdiction to the Lord Chancellor and the Master of the Rolls, not as judges of the Court of Chancery, but in respect of their independent offices as Lord Chancellor and Master of the Rolls, and that jurisdiction has not been transferred by any subsequent legislation. IN RE POLLARD - C. A. 656

4. —— *Costs—Charging Order—Lien—"Property recovered or preserved"—Priority*—23 & 24 *Vict. c.* 127, *s.* 28—*Court of Bankruptcy—Jurisdiction — Rehearing — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104.] In an action in the Chancery Division, by one partner against another, for a dissolution of the partnership, judgment was given for a dissolution, and the appointment of a receiver of the assets of the partnership. Both the partners were afterwards adjudged bankrupt; the action was transferred to the Queen's Bench Division in bankruptcy, and the judge having jurisdiction in bankruptcy made an order under 23 & 24 Vict. c. 127, s. 28, charging the costs of the plaintiff's solicitor on the funds in the hands of the receiver. Before this order was made, the landlord of the premises in which the bankrupts had carried on their business had given notice to the receiver of a claim for rent due to him, but had not attempted to distrain. The judge was not informed of this claim before he made the order, and he subsequently made a further order by which he directed the receiver to pay the rent due to the landlord, and to pay the balance in his hands to the solicitor:—*Held*, first, that the landlord, not having distrained, had no lien on the funds in the hands of the receiver in priority to the solicitor; secondly, that the charging order was not made by the judge in the exercise of his bankruptcy jurisdiction, and that he had consequently no power to rescind or vary it under s. 104 of the Bankruptcy Act, 1883. IN RE SUFFIELD AND WATTS. EX PARTE BROWN [C. A. 693

5. —— *Costs — Taxation — Remuneration for conducting Sale by Auction when Auctioneer paid by Client—Scale Fees — Solicitors Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*Gen. Ord., August*, 1882, 2, *Sched. I., Part I.*] A solicitor employed by the vendor to conduct business connected with a sale of freehold property by public auction is, where the sale is completed, only entitled to charge the scale fees prescribed by the General Order of August, 1882 (Sched. I., Part I), made under the Solicitors' Remuneration

SOLICITOR—*continued.*

Act, 1881. Where, therefore, the auctioneer's commission is paid by the client so that the scale of fees for "conducting the sale" does not, by r. 11 of Sched. I., Part I., apply, the solicitor is not entitled to charge the client anything for work done in respect of conducting the sale.—*In re Faulkner* (36 Ch. D. 566) overruled. IN RE NEWBOULD - - - - C. A. 204

STAMP—Promissory note—Agreement - 645
See REVENUE. 6.

STATUTES:—

29 Car. 2, c. 3, s. 4 - - - - 529
See HUSBAND AND WIFE. 2.

5 Eliz. c. 23, s. 10 - - - - 1
See ECCLESIASTICAL LAW. 3.

43 Eliz. c. 2, s. 7 - - - - 252
See POOR LAW.

3 Geo. 1, c. 15, s. 8 - - - - 107
See SHERIFF.

53 Geo. 3, c. 127, ss. 1, 2, 3 - - 1
See ECCLESIASTICAL LAW. 3.

2 & 3 Wm. 4, c. 45, s. 31 - - - 300
See PARLIAMENT.

—— —— s. 32 - - - - 287
See PARLIAMENT. 3.

—— —— s. 36 - - - - 302
See PARLIAMENT. 2.

3 & 4 Wm. 4, c. 15, ss. 1, 2 - - 378
See COPYRIGHT.

4 & 5 Wm. 4, c. 76, ss. 56, 57 - - 252
See POOR LAW.

1 & 2 Vict. c. 106, s. 104 - - - 460
See ECCLESIASTICAL LAW. 2.

5 & 6 Vict. c. 35 - - - - 753
See REVENUE. 5.

—— —— - - - - 442
See REVENUE. 3.

—— —— s. 133 - - - - 549
See REVENUE. 4.

5 & 6 Vict. c. 45, ss. 20, 21 - - 378
See COPYRIGHT.

6 Vict. c. 18, ss. 17, 100 - - 290
See PARLIAMENT. 6.

6 & 7 Vict. c. 73, s. 37 - - - 160
See SOLICITOR. 2.

—— —— —— - - - - 656
See SOLICITOR. 3.

8 Vict. c. 18, s. 34 - - - - 699
See WATERWORKS.

—— —— s. 133 - - - - 788
See POOR-RATE.

8 Vict. c. 20, s. 46 - - - - 485
See RAILWAY.

8 & 9 Vict. c. 18, ss. 6, 16 - - - 132
See COMPENSATION.

8 & 9 Vict. c. 118, s. 62 - - - 797
See INCLOSURE.

9 & 10 Vict. c. 66, s. 1 - - - 191
See POOR LAW. 4.

—— —— - - - - 407
See POOR LAW. 2.

9 & 10 Vict. c. 95, ss. 104, 115 - - 242
See COUNTY COURT. 6.

STATUTES—*continued.*

10 & 11 Vict. c. 17, ss. 6, 22, 25, 27 - 699
See Waterworks.
15 & 16 Vict. c. 81, s. 26, and schedule - 788
See Poor-rate.
16 & 17 Vict. c. 34 - - - 442
See Revenue. 3.
—— —— —— - - - - 753
See Revenue. 5.
—— —— Sched. A. s. 37 - - 589
See Revenue. 2.
17 & 18 Vict. c. 125, s. 11 - - 177
See Arbitration. 3.
18 & 19 Vict. c. 111, s. 1 - - - 475
See Ship.
19 & 20 Vict. c. 108, s. 26 - - - 56
See County Court. 7.
—— —— s. 50 - - - - 374
See County Court. 5.
—— —— s. 68 - - - - 202
See County Court.
—— —— ss. 78, 79, 83, Sched. (C.) - 727
See County Court. 4.
20 & 21 Vict. c. 85, s. 52 - - - 509
See Bankruptcy. 4.
20 & 21 Vict. c. clvii. s. 12 - - 780
See Mayor's Court.
—— —— ss. 16, 17, 19 - - - 554
See Mayor's Court. 2.
—— —— —— - - - - 643
See Mayor's Court. 4.
23 Vict. c. 14, s. 10 - - - 549
See Revenue. 4.
23 & 24 Vict. c. 127, s. 28 - - - 693
See Solicitor. 4.
25 & 26 Vict. c. 89, ss. 87, 92, 203 - 538
See Company. 3.
—— —— —— - - - - 683
See Company. 4.
—— —— s. 131 - - - - 387
See Company. 2.
28 & 29 Vict. c. 79, s. 8 - - - 191
See Poor Law. 4.
—— —— s. 11 - - - - 788
See Poor-rate.
28 & 29 Vict. c. 99 - - - 564
See County Court. 3.
29 & 30 Vict. c. 117, s. 4 - - - 450
See Poor-rate. 2.
30 & 31 Vict. c. 142, s. 10 - - 667
See County Court. 8.
—— —— s. 13 - - - - 202
See County Court.
31 & 32 Vict. c. 130, s. 3 - - - 415
See Artizans' and Labourers' Dwellings Act.
32 & 33 Vict. c. 27, ss. 8, 19 - - 430
See Inn.
32 & 33 Vict. c. 62, s. 5 - - - 120
See Husband and Wife. 3.
—— —— s. 27 - - - - 321
See Practice. 9.
32 & 33 Vict. c. 67, s. 47 - - - 749
See Metropolis.

STATUTES—*continued.*

32 & 33 Vict. c. 71, ss. 91, 94 - - 732
See Bankruptcy. 14.
33 & 34 Vict. c. 52 - - - - 832
See Practice. 4.
33 & 34 Vict. c. 97, s. 49 - - - 645
See Revenue. 6.
34 & 35 Vict. c. 31, s. 4 - - - 412
See Trade Union.
35 & 36 Vict. c. 76, s. 17 - - - 606
See Mine.
35 & 36 Vict. c. 86, Schedule, r. 12 - 554
See Mayor's Court. 3.
—— —— —— - - - - 643
See Mayor's Court. 4.
35 & 36 Vict. c. 93, s. 34 - - - 558
See Pawnbroker.
36 & 37 Vict. c. 66, s. 16 - - - 656
See Solicitor. 3.
—— —— s. 19 - - - - 1
See Ecclesiastical Law. 3
—— —— - - - - 491
See Practice. 11.
—— —— s. 47 - - - - 832
See Practice. 4.
37 & 38 Vict. c. 49 - - - - 221
See Inn. 2.
38 & 39 Vict. c. 55, ss. 13, 15, 18, 150, 207 63
See Local Government Acts. 3.
—— —— ss. 150, 189, 193, 326 - - 196
See Local Government Acts.
—— —— s. 180 - - - - 368
See Local Government Acts. 2.
38 & 39 Vict. c. 60, s. 22, sub-s. (*d*) - 423
See County Court. 2.
38 & 39 Vict. c. 63, s. 6 - - - 771
See Adulteration.
39 & 40 Vict. c. 61, s. 23 - - - 412
See Trade Union.
—— —— ss. 34, 35 - - - 597
See Poor Law. 5.
—— —— —— - - - - 191
See Poor Law. 4.
—— —— s. 35 - - - - 103
See Poor Law. 3.
41 & 42 Vict. c. 26, s. 28, sub-s. 2 - 387
See Parliament. 3.
41 & 42 Vict. c. 31, ss. 4, 5 - - 310
See Bill of Sale. 2.
—— —— s. 10, sub-s. 2 - - - 773
See Bill of Sale. 7.
—— —— —— —— - - - 775
See Bill of Sale. 8.
—— —— —— sub-ss. 2, 12, 14 - - 535
See Bill of Sale. 5.
41 & 42 Vict. c. 77, s. 10 - - - 810
See Local Government Acts. 4.
—— —— s. 13 - - - - 794
See Highway.
44 & 45 Vict. c. 41, s. 14 - - - 585
See Landlord and Tenant. 2.
44 & 45 Vict. c. 44 - - - 204
See Solicitor. 5.

STATUTES—*continued.*
45 & 46 Vict. c. 43, s. 4 - - - 114
See BILL OF SALE.
—— —— ss. 4, 5, 9 - - - 569
See BILL OF SALE. 6.
—— —— ss. 7, 9 - - - - 304
See BILL OF SALE. 3.
—— —— —— - - - 350
See BILL OF SALE. 4.
—— —— s. 9 - - - - 310
See BILL OF SALE. 2.
—— —— —— - - - - 785
See BILL OF SALE. 9.
45 & 46 Vict. c. 50, s. 9 - - - 285
See PARLIAMENT. 4.
—— —— s. 145, sub-s. 1 - - 788
See POOR-RATE.
45 & 46 Vict. c. 75, s. 1, sub-s. 2 - 120
See HUSBAND AND WIFE. 3.
—— —— —— sub-s. 5 - - - 249
See BANKRUPTCY. 9.
46 & 47 Vict. c. 52, s. 4, sub-s. (*a*), s. 43 540
See BANKRUPTCY.
—— —— —— s. 4, sub-s. 1 (*g*) - 318
See BANKRUPTCY. 3.
—— —— —— —— - - - 509
See BANKRUPTCY. 4.
—— —— —— —— - - - 512
See BANKRUPTCY. 5.
—— —— —— —— - - - 690
See BANKRUPTCY. 6.
—— —— —— —— s. 152 - - 249
See BANKRUPTCY. 9.
—— —— s. 6 - - - - 316
See BANKRUPTCY. 7.
—— —— s. 18, sub-s. 6 - - - 544
See BANKRUPTCY. 18.
—— —— ss. 18, 28, sub-s. 6 - - 258
See BANKRUPTCY. 17.
—— —— s. 27 - - - - 518
See BANKRUPTCY. 15.
—— —— s. 32 - - - - 816
See BANKRUPTCY. 16.
—— —— s. 46, sub-s. 1 - - - 40
See BANKRUPTCY. 10.
—— —— s. 47 - - - - 43
See BANKRUPTCY. 13.
—— —— s. 55, sub-s. 6 - - - 343
See BANKRUPTCY. 11.
—— —— s. 104 - - - - 693
See SOLICITOR. 4.
—— —— —— sub-s. 2 .. 121, sub-s. 3 341
See BANKRUPTCY. 8.
—— —— s. 125 - - - - 38
See BANKRUPTCY. 2.
46 & 47 Vict. c. 57, s. 31 - - - 491
See PRACTICE. 11.
46 & 47 Vict. c. 61, s. 45 - - - 807
See LANDLORD AND TENANT.
48 Vict. c. 3, s. 3 - - - - 285
See PARLIAMENT. 4.
48 Vict. c. 15, s. 18, sched. 2, Form I. No. 2
See PARLIAMENT. 7. [294

STATUTES—*continued.*
48 Vict. c. 15, s. 18, sched. 3, Form I. No. 1 and 2 - - - - - 297
See PARLIAMENT. 5.
48 & 49 Vict. c. 51, s. 11, sub-s. 3 - 621
See REVENUE.
48 & 49 Vict. c. 69, s. 4 - - - 827
See CRIMINAL LAW. 2.
—— —— s. 20 - - - - - 829
See CRIMINAL LAW.
49 & 50 Vict. c. 52, s. 1 - - - 76
See HUSBAND AND WIFE.
50 & 51 Vict. c. 71, s. 20 - - - 410
See CORONER.

STAY OF ACTION — Practice — Winding-up — Official liquidators—Action against, in personal capacity - - - 683
See COMPANY. 4.

STAYING PROCEEDINGS—General agreement to refer future disputes to arbitration—Submission to particular arbitrators
See ARBITRATION. 3. [177

STOCK EXCHANGE—Custom—Sale of shares—Refusal of company to register transfer
See COMPANY. [576

STOPPAGE IN TRANSITU—Goods bought for shipment abroad—Delivery of goods on board of ship—Termination of transit
See SALE OF GOODS. [615

STREET—Local Government Acts—Sewer not made for person's own profit—Liability of frontagers - - - 63
See LOCAL GOVERNMENT ACTS. 3.

SUBMISSION—Revocation—Effect of - 177
See ARBITRATION. 3.

SUPPORT, RIGHT TO—Mines under or near canal Compensation for not working mines 391
See CANAL COMPANY.

TELEGRAPH—Contract—Mayor's Court—Jurisdiction - - - - 640
See MAYOR'S COURT.

TENDER—Defence setting up tender—Denial of liability — Continuance of action—Payment out of Court - - 722
See PRACTICE. 7.

TITHE COMMUTATION RENT-CHARGE — Annual value—Income tax - 442
See REVENUE. 3.

TRADE UNION — *Right of Guardians to reimbursement by, as a Benefit Society—Enforcement of Agreement with—Trade Unions Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 4—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 23.] A trade union is not a "benefit or friendly society" from which guardians of the poor can claim reimbursement under s. 23 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 23, in respect of the maintenance of a pauper. WINDER *v.* GOVERNORS AND GUARDIANS OF KINGSTON-UPON-HULL CORPORATION FOR THE POOR - - - - 412

TRADER—Bankruptcy—Apothecary - 732
See BANKRUPTCY. 14.

TRANSFER—Sale of shares—Refusal of company to register transfer - - 576
See COMPANY.

TRUST DEED — Release — Assignment of property to trustee for the benefit of creditors generally—Right of party to the assignment to prove in bankruptcy
See BANKRUPTCY. [540

TRUSTEE — Receiver — Fund in discretion of trustees—Order against trustees for payment—Excess of jurisdiction - 167
See RECEIVER.

—— Settlement—Voluntary conveyance—Costs—Lien on trust fund - - 43
See BANKRUPTCY. 13.

UMPIRE—Implied contract to pay reasonable remuneration—Mercantile reference 48
See ARBITRATION. 2.

VENDOR AND PURCHASER—*Agreement for purchase of Lease—Constructive Notice of Covenants in Lease—Onerous Covenants.*] When an agreement has been entered into for the purchase of an existing lease, the purchaser is not affected with constructive notice of the covenants contained in the lease, and is not bound to complete the contract if the lease is subject to onerous covenants of an unusual character, unless before the agreement was made he had a fair opportunity of ascertaining for himself the terms of such covenants.—The principle of the decision in *Hyde* v. *Warden* (3 Ex. D. 72) applies to an agreement to purchase an existing lease, as well as to an agreement to take an underlease. REEVE *v.* BERRIDGE
[C. A. 523

VOLUNTARY CONVEYANCE — Bankruptcy — Costs of trustees of settlement—Lien on trust fund - - - - 43
See BANKRUPTCY. 13.

WALES—Ecclesiastical law—Clergyman ignorant of Welsh language—Refusal to institute—Discretion—Due examination and inquiry - - - - 460
See ECCLESIASTICAL LAW. 2.

WARRANTY—Action for breach of warranty—Damages—Sub-sale with similar warranty—Costs of action by sub-vendee
See DAMAGES, MEASURE OF. [79

—— Sale of horse—Condition for return—Horse disabled - - - - 824
See SALE OF GOODS. 2.

WATERWORKS—*Reservoir—Mines—Compensation for Minerals not workable—Apprehended Injury to Mine—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 22, 25, 27—*Costs incidental to Arbitration—Special Case—Jurisdiction over Costs—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 34.] By the Waterworks Clauses Act, 1847, s. 25, the undertakers of waterworks shall from time to time pay for any mines or minerals not purchased by the undertakers which cannot be obtained by reason of making and maintaining the works, or by reason of apprehended injury from the working thereof.—The claimants were lessees of a coal mine, comprising four seams of coal running beneath land which the corporation had, under a special Act incorporating the Waterworks Clauses Act, 1847, acquired in order to make a reservoir there. The claimants were working three of the seams, and preparing to sink a shaft to work the fourth, called the Cannel seam, and they gave notice of their intention to work the seams under and within the prescribed limits of the land of the corporation, who thereupon gave notice to treat for the purchase of a part of one of the lower seams. An arbitrator found, in a special case stated for the opinion of the Court, that the workings of the claimants had not yet approached the reservoir so as to cause any present risk to the mines from it, but that, assuming the corporation to purchase and retain in situ the part of the seam for which they had given notice and no other coal, the claimants, by reason of the waterworks and of apprehension of injury therefrom to the Cannel seam, could not work or get more than 50 per cent. of the Cannel coal under the reservoir or within twenty yards of its boundary, and that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working or getting more than 50 per cent. of the Cannel coal:—*Held*, by Fry and Lopes, L.JJ. (Lord Esher, M.R., dissenting), reversing the decision of the Queen's Bench Division, that on these findings the arbitrator was not justified in awarding compensation under the Act for the 50 per cent. of the Cannel coal which could not be obtained.—*Held*, also, that the costs of a special case stated by the arbitrator were costs incidental to the arbitration within the meaning of s. 34 of the Lands Clauses Consolidation Act, 1845, and were therefore costs over which the Court of Appeal had no jurisdiction. IN RE ARBITRATION BETWEEN HOLLIDAY AND MAYOR, &C., OF WAKEFIELD - - - - - C. A. 699

WAY, RIGHT OF—Grant by general words—Appurtenances - - - 225
See EASEMENT.

WINDING-UP—Company—Contract required for beneficial winding-up - - 387
See COMPANY. 2.

WORDS—"Carry on business" - - 780
See MAYOR'S COURT. 2.

—— "Criminal cause or matter" - - 832
See PRACTICE. 4.

—— "Owner" - - - - 415
See ARTIZANS' AND LABOURERS' DWELLINGS ACT.

WRIT—Service out of jurisdiction—Contract affecting land - - - 147
See PRACTICE.

—— Service out of jurisdiction—Contract to do work in Isle of Man - - 152
See PRACTICE.

—— Specially indorsed writ—Defence—Time for delivery of—Irregular judgment—Setting aside - - - - 764
See PRACTICE. 8.

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